Petition

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81-5114
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DELBERT LEE TIBBS,

PETITIONER,

-vs-

STATE OF FLORIDA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

WHETHER or not the re-trial of DELBERT L. TIBBS should be barred on the grounds that re-trial would violate the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

DELBERT LEE TIBBS,

PETITIONER,

-vs-

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The Petitioner, DELBERT LEE TIBBS, respectfully prays that a "Writ of Certiorari" issue to review the judgment of the Supreme Court of the State of Florida, entered on April 9, 1981.

OPINION BELOW

The Supreme Court of the Stateof Florida entered its opinion ordering a new trial for Petitioner on April 9, 1981. Petition for rehearing was denied on June 3, 1981. A copy of the Opinion, Tibbs v. State of Florida, 397, So. 2d 1120, is attached as Appendix A. A copy of the Order denying the petition for rehearing is attached as Appendix B. A copy of the original Opinion reversing for a new trial, Tibbs v. State of Florida, 337, So.2d 788 (Fla.1976) is attached as Appendix C.

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On June 3rd, 1981, the Florida Supreme Court refused rehearing on its Opinion of April 9, 1981, ordering a new trial for DELBERT LEE TIBBS. Since the original Tibbs case, Tibbs v. State of Florida, 337, So.2d 788 (Fla.1976), was reversed prior to Burks v. United States, 437 U.S. 1 (1978), it is the Petitioners' contention that the Double Jeopardy Clause of the U.S. Constitution has been violated. The jurisdiction of this Court is invoked under the U.S. Constitution, Title 28 U.S. Code, Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Double Jeopardy Clause, Fifth Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

On July 6, 1976, the Florida Supreme Court reversed the conviction of DELBERT L. TIBBS, for murder and rape and ordered a new trial. The Court held that the circumstances indicated that except for testimony of victim, not one shred of evidence was developed to place Defendant in area at any time, that no trace was ever found of the truck which victim stated was driven by Defendant when she and other victim were picked up and taken to scene of crime, that no gun or car keys were found in Defendant's possession, at scene of crime or elsewhere, and that no evidence was introduced to cast doubt on Defendant's veracity when considered with facts that several features of victims' testimony cast doubt on her believability and that Defendant cooperated fully

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with officers, were insufficient to establish Defendant as perpetrator of crimes.

The Court in Tibbs v. State, supra, [Appendix C-4], said:

> "(6) Several features of Nadeau's testimony, when considered with other evidence in the record independently established and uncontroverted, cast doubt on her believability. For one, despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs' features and characteristics into her mind, all independent evidence of the events indicates that the crimes occurred after nightfall. For another, her admitted use of marijuana throughout the day and immediately prior to the crimes casts doubt on her identification of Tibbs. Thirdly, the manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than would have been possible with multiple photographs of one person...
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial."

Subsequent to the reversal in 1976, and prior to trial the Circuit Court found that retrial violates the double jeopardy clause of the U.S. Constitution, based upon Burke v. United States, 437 U.S. 1 (1978), and Greene v. Massey, 437 U.S. 19, (1978), and the State Appealed.

In the State v. Tibbs, 370 So.2d 386 (Fla. 2d DCA 1979), the Second District Court of Appeal held that the prior appellate reversal was based on weight rather than legal insufficiency of the evidence.

On Certiorari the Florida Supreme Court held that as a ground for appellate reversal the rule that evidence is technically sufficient but its weight is so tenous or unsubstantial as to require new trial in interest of justice would be eliminated

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from the State law. However, they held that in this particular case, the double jeopardy clause was not violated by ordering a new trial.

REASONS FOR GRANTING THE WRIT

The original decision in the Florida Supreme Court, Appendix "C", was rendered by Justices Sundberg, Hatchett, Boyd and England. This was before Burks and Greene, supra. In the present Opinion, Appendix "A", Justices Boyd, England and Sundberg all dissent from the majority opinion. Justice Hatchett is no longer with the Court. The majority found that double jeopardy did not apply since the original decision was based on weight rather than insufficiency of the evidence. The Judges who are all part of the original majority, all dissented, and would have ordered Delbert Tibbs free. Justice Sundberg wrote a dissenting opinion analyzing the application of Burks v. U.S., supra, and the double jeopardy principle, better that I can. He said:

> "Tibbs v. State, Appendix A-8. - ....Furthermore, I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed--yes or no, why or why not. The answer is ineluctably affirmative. The reason requires an examination of double jeopardy principles. Whether the first trial results in an acquittal, conviction or no verdict, a major purpose of protection against double jeopardy is to prevent the imposition of multiple trials upon the defendant. See Price v. Georgia,398 U.S. 323, 331, 90, S.Ct. 1757, 1762, 26 L.Ed2d 300(1970). Because of its superior resources, the state must not be allowed to prosecute the Defendant for the same offense until it achieves the desired conviction. See United States v. Scott, 437 U.S. 82, 87, 98 SCt.2187, 2191, 57 L.Ed.2d 65 (1978). The double jeopardy clause is aimed at

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checking prosecutorial discretion and at preventing abuse of criminal prosecution used as a means of government oppression. These purposes are well summarized in the oft-quoted passage from Green v. United States, 355, U.S. 184, 187-88, 78 S.Ct.221, 223, 2 L.Ed2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Central to the prohibition against double jeopardy is the barrier forbidding a "second trial for the purpose of affording the prosecution another opportunity to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1(1978) (footnote ommitted). The state is not allowed a "second crack" at convicting a defendant when its first effort fell short of the mark because it somehow failed to present the proper evidence. See Swisher v. Brady,438U.S. 204, 216, 98 S.Ct. 2699, 2706, 57 L.Ed2d 705 (1978). This is the rationale underlying Burks which recognizes that an appellate reversal for lack of evidence is tantamount to an acquittal. This is because such a decision by an appellate court constitutes "a decision to the effect that the government has failed to prove its case." Burks, 437 U.S. at 15, 98 S.Ct. at 2149.

At A-11 in Tibbs v. State, Justice Sundberg said:

> "...There can be no doubt that our original reversal of Tibbs conviction was due to this Court's perception that the state had failed to establish the identity of Tibbs as the perpetrator of the murder and rape. This surely belongs in the category of evidentiary insufficiency and not trial error. Likewise, under the Scott distinction, the basis of the reversal was one going to a factual element of the case, identity, and was not a technical legal problem such as a preindictment delay by the prosecution. We were not concerned that Tibbs did not receive a procedurally fair trial; we were concerned with the insufficiency of a factual showing of identification. Under either the Burks or Scott distinction, Tibbs' case is therefore one which deserves protection from double jeopardy.

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"...I would quash the decision of the District Court of Appeal, Second District, because retrial of the Defendant violates the Fifth Amendment, recognizing that what we did in reversing Tibb's conviction was to assess some form of factual deficiency in the evidence proving Defendant's guilt."

Justice Boyd in his dissent makes a very persuasive argument supporting the contention that Double Jeopardy should bar a retrial. In Tibbs v. State, Supra, Appendix A-12, he says:

"Greene and Burks now make clear that when an appellate Court finds that a judgment cannot stand because the state has failed to carry its burden of proof, it is a violation of the Fifth and Fourteenth Amendments to allow the state to have another chance.

...The Double Jeopardy Clause was written to prevent precisely what the Court's decision today allows--successive attempts by the state to prove its accusations. This Court's holding that the state failed to carry its burden in Petitioner's trial, and that the conviction therefore could not stand, should now be seen as the equivalent of a judgment of acquittal, and be afforded the same finality as a jury verdict to that effect. Petitioner should be forever discharged from the accusations made against him.

Under my reading of the opinion of the Court, if the same evidence is presented against Tibbs on re-trial as was adduced at his first trial, he is found guilty, and he challenges the sufficiency of the evidence, the Court having jurisdiction of the appeal will be obliged to hold the evidence sufficient to support a conviction. Yet when the previous judgment was before this Court on appeal, it was held that the same evidence was not enough to support the conviction. This flies in the face of principles of res judicata and, I repeat, violates the Double Jeopardy Clause. The Court is saying that we made a mistake when we reversed the original conviction, that we erred in our evaluation of the question of evidentiary sufficiency. I do not agree that we erred; even if we did, however, it is too late now to correct the error. In my view, the only error was in allowing a new trial."

Justice England while concurring with the majority's opinion held that Tibbs should not be retried in the interest of justice. The Court was asked to review its original decision in light of Burks and Greene, Supra. It would seem that the best interpretation

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of what the Court originally intended in reversing, would be made by the original Justices who concurred in the original majority opinion. Justice Hatchett is no longer on the Court and the remaining members of the original majority now concur in saying that DELBERT should be free.

This opinion indicates that the present majority composed of the original dissenting minority joined by two new Justices, is using hindsight in saying that the original decision was based on weight rather than insufficient evidence. They also go on to say that this is a poor distinction and is being abolished by this opinion. Yet they come to the conclusion that DELBERT TIBBS, should be re-tried on evidence which was originally held to be lacking in weight, with a common synonym for this awkward phrase being insufficient. Both Justice Boyd and Justice Sundberg have eloquently set out the basic reasons why Double Jeopardy should bar DELBERTS' trial.

CONCLUSION

For the foregoing reasons, Petitioner, respectfully submitts that a "Writ of Certiorari" should be issue to review the judgment of the Florida Supreme Court.

DATED: July 13, 1981

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Delbert Lee TIBBS, Petitioner,

v.

STATE of Florida, Respondent.

No. 56918.

Supreme Court of Florida.

April 9, 1981.

Rehearing Denied June 3, 1981.

Defendant was convicted in the Circuit Court, Lee County, Thomas Shands, J., of rape and of murder in the first degree, and he appealed. The Supreme Court, England, J., 337 So.2d 788, reversed and remanded for new trial. On remand, the Circuit Court, Lee County, Jack R. Schoonover, J., found that retrial would violate double jeopardy clause, and State appealed. The District Court of Appeal, Boardman, J., 370 So.2d 386, reversed and remanded, concluding that prior appellate reversal was based on weight rather than legal insufficiency of evidence, and denied defendant's petition for rehearing. Defendant petitioned for review. On certiorari to the District Court of Appeal, the Supreme Court held that: (1) ground for appellate reversal of conviction that evidence is technically sufficient but its weight is so tenuous or insubstantial as to require new trial in interests of justice would be eliminated from State law, and (2) where conviction was reversed due to number of infirmities in evidence establishing defendant as perpetrator of crime, and case was remanded for new trial, determination, on appeal from order on remand directing defendant's discharge from prosecution, that reversal was based on weight rather than legal insufficiency of evidence and thus retrial was not barred by double jeopardy would be affirmed, even though United States Supreme Court had held subsequent to reversal but prior to date of proposed retrial that double jeopardy clause prohibits retrial where appellate court reverses conviction on ground that evidence is insufficient and even though, on instant appeal, Supreme Court abolished doctrine permitting appellate reversal based on evidentiary weight rather than insufficiency.

District Court of Appeal affirmed.

Sundberg, C. J. and England, J., concurred in part and dissented in part and filed separate opinions.

Boyd, J., filed dissenting opinion.

1. Criminal Law ⇐561(1)

Finding that evidence is "legally insufficient" means that prosecution has failed to prove defendant's guilt beyond a reasonable doubt.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐549

"Weight of the evidence" is a determination of trier of fact that greater amount of credible evidence supports one side of issue or cause than the other.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1159.2(2)

A finding that the verdict is against the weight of the evidence is not a finding that evidence is legally insufficient.

4. Criminal Law ⇐1159.3(4)

Generally, an appellate court should not retry a case or reweigh conflicting evidence submitted to jury or other trier of fact; rather, concern on appeal must be whether, after all conflicts in evidence and all reasonable inferences therefrom have been resolved in favor of verdict, there is substantial, competent evidence to support verdict and judgment.

5. Criminal Law ⇐1159.2(1)

Legal sufficiency alone, as opposed to evidentiary weight, is appropriate concern of appellate tribunal.

6. Criminal Law ⇐1182

Duty on appeal, once District Court of Appeal determines that evidence supports conviction and trial was free of error, is to affirm conviction.

Appendix A

A-1

7. Criminal Law ⇐1159.2(1)

Ground for appellate reversal that evidence is technically sufficient to support conviction but its weight is so tenuous or insubstantial as to require a new trial in the interests of justice would be eliminated from State law.

8. Criminal Law ⇐1186.1

Reversal of judgment or conviction "in the interest of justice" is viable and independent ground for appellate reversal. 32 West's F.S.A. Florida Appellate Rules, Rule 9.140(f).

9. Criminal Law ⇐1134(1)

Second sentence of rule authorizing court to grant any relief to which party is entitled in interest of justice, providing that court in capital cases shall review evidence to determine if interest of justice requires new trial whether or not insufficiency of evidence is issue presented for review, means no more than that additional review requirement is imposed when insufficiency of evidence is not specifically raised on appeal, i. e., that reviewing court should consider sufficiency and how, and, if warranted, reverse conviction, and consequence of such action would be to bar retrial under double jeopardy clause. 32 West's F.S.A. Florida Appellate Rules, Rule 9.140(f); U.S.C.A. Const. Amend. 5.

10. Criminal Law ⇐193

Where conviction was reversed due to number of infirmities in evidence establishing defendant as perpetrator of crime, and case was remanded for new trial, determination on appeal from order on remand directing defendant's discharge from prosecution that reversal was based on weight, rather than legal insufficiency, of evidence and thus retrial was not barred by double jeopardy would be affirmed, even though United States Supreme Court had held that double jeopardy clause prohibits retrial where appellate court reverses conviction on ground that evidence is insufficient and even though, on instant appeal, state Supreme Court abolished doctrine permitting appellate reversal based on evidentiary weight rather than insufficiency. U.S.C.A. Const. Amend. 5; 32 West's F.S.A. Florida Appellate Rules, Rule 9.140(f); 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.600(a)(2).

Louis R. Beller, Miami Beach, and Jerry Paul, Durham, N. C., for petitioner.

Jim Smith, Atty. Gen., Eula Tuttle Mason and Charles Corces, Jr., Asst. Attys. Gen., Tampa, for respondent.

PER CURIAM.

This case brings us the responsibility to delineate the occasions for retrial and discharge, respectively, of criminal defendants whose convictions have been reversed by Florida appellate courts. It arises from the decision of the Second District Court of Appeal in *State v. Tibbs*, 370 So.2d 386 (Fla.2d DCA 1979).

I

In *Tibbs v. State*, 337 So.2d 788 (Fla. 1976), we reversed the petitioner Delbert Tibbs' original conviction for rape and for first-degree murder, and we remanded for a new trial. On remand, the trial court granted Tibbs' motion to dismiss the indictment against him on the ground that retrial would violate the double jeopardy clause of the fifth amendment to the United States Constitution. The trial court based its dismissal on two intervening decisions of the United States Supreme Court—*Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). *Burks* had held that the double jeopardy clause prohibits retrial where an appellate court reverses a conviction on the ground that the evidence is insufficient, and *Greene* applied that newly-articulated constitutional principle to the states' judicial systems.

On appeal of the order directing Tibbs' discharge from prosecution, the Second District Court of Appeal reversed. After analyzing our opinion reversing Tibbs' convictions, the district court concluded that the principles enunciated in *Burks* and *Greene* would not bar Tibbs' retrial since our rever-

sal was based on the weight, rather than the legal insufficiency, of the evidence. The district court based its decision on a long line of Florida cases ostensibly standing for the proposition that an appellate court can reverse a conviction when the evidence is technically sufficient but its weight so tenuous as to require a new trial in the interests of justice.

One day after the Second District's action, we decided *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979). As in the present case, McArthur's original conviction had been reversed and remanded for a new trial.[1] After analyzing the earlier opinion, we concluded that our reversal had been based on the insufficiency of the evidence, so that *Burks* and *Greene* operated to preclude McArthur's retrial. We expressly left open the double jeopardy implications of appellate reversals based on evidentiary weight, as opposed to sufficiency.[2]

Tibbs then filed a petition for rehearing in the district court alleging that *McArthur* should be applied in his case to bar further prosecution. The Second District denied rehearing, emphasizing once again its belief that Tibbs' reversal had been based on the weight of the evidence rather than its legal insufficiency.[3] After this denial, Tibbs brought his case to us for review.

We are asked by Tibbs to rule that our reversal of his original convictions was based on evidentiary insufficiency, not evidentiary weight. Beyond simply examining the foundation for our prior opinion as we did in *McArthur*, we perceive the need to explain the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary insufficiency, and to determine whether that distinction, if one really exists, shall remain viable in Florida.

II

At the outset, we note that the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*. In that case the Supreme Court ruled that the double jeopardy clause of the fifth amendment precluded retrial because an appellate reversal for insufficient evidence is essentially an acquittal. If a trial court holds the evidence insufficient, a judgment of acquittal will be entered and the defendant cannot be retried.[4] If should make no difference, the Court reasoned, that the appellate court rather than the trial court determined the evidence to be insufficient. In either situation, the government has failed to prove its case.[5]

The Court was careful to distinguish reversals for procedural errors in a trial, where double jeopardy does not bar retrial. In such cases, a reversal does not indicate that the government's case has failed, but simply that the judicial process leading to conviction was defective in some critical way. Retrial is appropriate since "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."[6]

After *Burks*, the double jeopardy implications of two categories of appellate reversal—reversals for insufficient evidence and reversals for trial error—are relatively clear. The district court, however, distinguished *Burks* by placing Tibbs' reversal in a third category: appella
the evidence is technically
weight is so tenuous or in
new trial is ordered in th
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III

[1-3] The weight and
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Sufficient evidence is "
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(5th ed. 1979). In the cri
ing that the evidence is

1. *McArthur v. State*, 351 So.2d 972 (Fla.1977).

2. *McArthur v. Nourse*, 369 So.2d 578, 581 n.11 (Fla.1979).

3. *State v. Tibbs*, 370 So.2d 386, 388-89 (Fla.2d DCA 1979).

4. *See Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

5. The Court reasoned that to hold otherwise would create a "purely arbitrary distinction" between a defendant who received the benefit of a correct lower court decision and one who did not. *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).

6. *Id.* at 15, 98 S.Ct. at 2149.

7. *McArthur v. Nourse*, 369
(Fla.1979).

8. *Greene v. Massey*, 437
S.Ct. 2151, 2155 n.10, 57

9. At the trial level, the we
tinction is apparent in ou
Procedure. We noted in
369 So.2d 578 (Fla.1979) th
[a] critical distinction h
since 1967, when rules 3.
and 3.600 of the Florida
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Id. at 580 (footnote omitted
Rule 3.600(a)(2) thus enabl
weigh the evidence and det
ty of witnesses so as to
additional juror. It follow
the trial judge that the we
weight of the evidence is n
evidence is legally insuffici

3

a third category: appellate reversals where the evidence is technically sufficient but its weight is so tenuous or insubstantial that a new trial is ordered in the interests of justice. While this third category of appellate reversals is often identified in Florida cases, both this Court in *McArthur*[7] and the United States Supreme Court in *Greene*[8] declined to rule on its double jeopardy implications. Without any guidance from either of us, the district court endeavored as best it could to find a place for the weight-sufficiency distinction in Florida's jurisprudence. It is no reflection on that court that we now take a somewhat different view of the matter.

III

[1–3] The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy. Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Black's Law Dictionary 1285 (5th ed. 1979). In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. *Burks v. United States*, 437 U.S. 1, 16 n.10, 98 S.Ct. 2141, 2150 n.10, 57 L.Ed.2d 1 (1978). Weight, at least in theory, is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." Black's Law Dictionary 1429 (5th ed. 1979). It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. *See In re Estate of Brackett*, 109 So.2d 375 (Fla.2d DCA 1959).[9]

[4, 5] As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact.[10] Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.[11] Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.[12]

7. *McArthur v. Nourse*, 369 So.2d 578, 581 n.11 (Fla.1979).

8. *Greene v. Massey*, 437 U.S. 19, 26 n.10, 98 S.Ct. 2151, 2155 n.10, 57 L.Ed.2d 15 (1978).

9. At the trial level, the weight-sufficiency distinction is apparent in our Rules of Criminal Procedure. We noted in *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979) that:

> [a] critical distinction has existed at least since 1967, when rules 3.380 (formerly 3.660) and 3.600 of the Florida Rules of Criminal Procedure were adopted. Rule 3.380(a) provides that a motion for judgment of acquittal should be granted if, at the close of the evidence, "the court is of the opinion that the evidence is *insufficient* to warrant a conviction." In contrast, rule 3.600(a)(2) provides that a motion for new trial shall be granted if the jury verdict is "contrary to law or the *weight* of the evidence."

Id. at 580 (footnote omitted) (emphases added). Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror. It follows that a finding by the trial judge that the verdict is against the weight of the evidence is not a finding that the evidence is legally insufficient. *See Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), *cert. denied*, 439 U.S. 1135, 99 S.Ct. 1059, 59 L.Ed.2d 97 (1979).

10. *See, e. g., Chaudoin v. State*, 362 So.2d 398 (Fla.2d DCA 1978) (weight and credibility solely within province of jury; appellate court's only function to determine sufficiency as a matter of law); *Abbott v. State*, 334 So.2d 642 (Fla.3d DCA 1976), *cert. denied*, 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977) (conflicts in evidence and questions about witness' credibility will not justify reversal when evidence is legally sufficient to support conviction); *Wetherington v. State*, 263 So.2d 294 (Fla.3d DCA 1972).

11. *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975); *Wooten v. State*, 361 So.2d 167 (Fla.3d DCA 1978); *Dawson v. State*, 338 So.2d 242 (Fla.3d DCA 1976).

12. One problem, of course, is whether an appellate court actually "reweighs" the evidence in reviewing a trial court's grant or denial of a motion for new trial based on the ground that the verdict is contrary to the weight of the evidence. *See* note 9 *supra*. Although Florida case law offers no clear answer, *see Mancini v.*

IV

The district court in this case reviewed a number of Florida appellate decisions reversing convictions on the alleged basis of evidentiary weight. Although the court's analysis is plausible, we prefer to view these ambiguous decisions as reversals which were based on sufficiency; that is, as cases in which the state failed to prove the defendant's guilt beyond a reasonable doubt. *See Greene v. Massey*, 437 U.S. 19, 25, 98 S.Ct. 2151, 2154, 57 L.Ed.2d 15 (1978).

The first decision cited by the district court was *Williams v. State*, 58 Fla. 138, 50 So. 749 (1909). In that case, the court stated: "After carefully weighing the evidence, we are irresistibly impelled to the conclusion that there was not sufficient evidence adduced to warrant the [guilty] verdict of the jury ...." 58 Fla. at 151-52, 50 So. at 754. Although this language is imprecise, a careful reading of the opinion seems to indicate that reversal was based on the state's failure to place the defendants at the scene of the crime or to prove that they fired the fatal shots.

McNeil v. State, 104 Fla. 360, 139 So. 791 (1932), and *Woodward v. State*, 113 Fla. 301, 151 So. 509 (1933), are similar to *Williams*. In *McNeil* this court reversed because "the evidence of identity of the accused as being the guilty party [was] not satisfactory to the appellate court ...." 104 Fla. at 361, 139 So. at 792. The state, it appears, had failed to introduce substantial competent evidence to support its assertion that the defendant was present at the scene of the robbery. Since every material element of the offense was not proven, the evidence was insufficient to support a conviction. *See Gaetano v. State*, 273 So.2d 84 (Fla.4th DCA 1973); *Parnell v. State*, 218 So.2d 535 (Fla.3d DCA 1969).

In *Woodward* the court granted a new trial "in view of the uncertainties appearing in the evidence, and the strong doubt which the evidence raises as to the defendants' guilt...." 113 Fla. at 302, 151 So. at 509. Again, a close reading of the case leads us to think that Woodward's guilt was not established beyond and to the exclusion of every reasonable doubt.

The district court also relied upon *Skiff v. State*, 107 Fla. 90, 144 So. 323 (1932), and *Fuller v. State*, 92 Fla. 873, 110 So. 528 (1926). In *Skiff*, the Court reversed a rape conviction because the requisite evidence of the victim's character was unconvincing, explaining that "[t]he previous chaste character of the alleged victim is a material fact to be proved [by the state]." 107 Fla. at 91, 144 So. at 323. Here again, the reversal seemed to be predicated on the state's failure to prove every element of the crime. Likewise in *Fuller*, the court framed the issue presented by the principal contention on writ of error as "the sufficiency of the evidence to establish the identity of the defendant as the perpetrator of this homicide." 92 Fla. at 874, 110 So. at 528. *See also Ming v. State*, 89 Fla. 280, 103 So. 618 (1925).

The district court also relied on *Lowe v. State*, 154 Fla. 730, 19 So.2d 106 (1944), where the court granted "a new trial because of the inconclusiveness of the testimony offered to establish the essential facts necessary to constitute the crime...." *Id.* at 737, 19 So.2d at 110. Like the other "weight" cases which the district court considered, it is probable that *Lowe* in fact dealt with the state's failure to prove a material fact, which goes to the sufficiency of the evidence.

Our hindsight analysis of the foregoing cases does not mean that all Florida appellate decisions can be reconciled, or that none explicitly relied on evidentiary weight as the sole basis for reversal. Two cases in 1970, *Sosa v. Maxwell*, 234 So.2d 690 (Fla. 2d DCA 1970), and *Smith v. State*, 239 So.2d 284 (Fla. 2d DCA 1970), recognized that evidentiary weight could serve as a basis for appellate reversal.

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13. *Greene v. Massey*, 384 So.2d 2

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Sosa v. Maxwell was preceded by *Sosa v. State*, 215 So.2d 736 (Fla.1968), where we had reversed the defendant's convictions and remanded for a new trial because "evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree...." *Id.* at 737. In *Sosa v. Maxwell*, the district court denied a writ of prohibition to bar retrial and characterized our earlier reversal as going to the weight, not sufficiency, of the evidence. We later denied certiorari review without opinion. *Sosa v. Maxwell*, 240 So.2d 640 (Fla.1970). Our denial of certiorari, of course, was not an adjudication on the merits although it made the district court's *Sosa* decision the "law of the case."[13] Our original opinion persuasively suggests, however, that the conviction actually was reversed because the state failed to carry its burden of proof—that is, the reversal was based on the insufficiency of the evidence. The district court, it now seems, simply interpreted our decision wrongly.

[6] In *Smith v. State*, 239 So.2d 284 (Fla. 2d DCA 1970), the district court reversed a conviction for rape. Although there was some evidence to support each element of the offense, the court concluded that the record as a whole disclosed such a possibility of error that a new trial was required. The court stated: "[J]udges have historically granted new trials in the interest of justice where the record, though technically sufficient, raises so much doubt that the conviction cannot in conscience be upheld." *Id.* at 290 (footnote omitted). On appeal we unanimously reversed. *State v. Smith*, 249 So.2d 16 (Fla.1971). Describing the district court's opinion as "novel," we held:

> A twelve-man jury evaluated the evidence, including the credibility of the witnesses, presented in this case and found respondent guilty of the offenses charged. On appeal, the District Court determined that the evidence supported the conviction and the trial was free of error. Once that determination was made, the duty of the District Court was to affirm the conviction.

Id. at 18. We believe this approach is the correct one, and we today reaffirm it as a guiding principle of appellate review.

V

[7] As the above analysis indicates, the district court's third category of appellate reversals—where the evidence is technically sufficient but its weight is so tenuous or insubstantial as to require a new trial in the interests of justice—has a questionable historical foundation. The cases relied on by the district court, though confusing and ambiguous in language, can each be seen as involving reversals based on the insufficiency of the evidence. In any event, the formulation in *State v. Smith* suggests that this third category of appellate reversals, if ever valid in Florida, should now be eliminated from Florida law. Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial. Cases now pending on appeal in which a court has characterized the reversal as based on evidentiary weight should be reconsidered in light of our decision today, and under the doctrine of *Burks* and *Greene* any retrial of those cases may or may not be barred on the basis of former jeopardy.

Considerations of policy support, if not dictate, this result. Elimination of the third category of reversal accords Florida appellate courts their proper role in examining the sufficiency of the evidence, while leaving questions of weight for resolution only before the trier of fact. Eliminating reversals for evidentiary weight will avoid disparate appellate results, or alternately our having to review appellate reversals based on evidentiary shortcomings to determine whether they were based on sufficiency or on weight. Finally, it will eliminate any temptation appellate tribunals might have to direct a retrial merely by styling reversals as based on "weight" when in fact there is a lack of competent substantial

13. *Greene v. Massey*, 384 So.2d 24 (Fla.1980).

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evidence to support the verdict or judgment and the double jeopardy clause should operate to bar retrial.

VI

[8] One further note is in order regarding the scope of our decision today. Many of the "weight" cases cited by the district court included a statement that a new trial was being ordered "in the interest of justice." By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction "in the interest of justice." The latter has long been, and still remains, a viable and independent ground for appellate reversal. Rule 9.140(f) of the Florida Rules of Appellate Procedure (1977) provides the relevant standards:

> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

This rule, or one of its predecessors, has often been used by appellate courts to correct *fundamental* injustices, unrelated to evidentiary shortcomings, which occurred at trial.[14] Retrial in these circumstances is neither foreclosed, nor compelled, by double jeopardy principles. Each situation is unique.

[9] With respect to the special mention of capital cases in the second sentence of the rule, we take that sentence to mean no more than that an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal—namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction. The consequence of that action would be to bar retrial under the double jeopardy clause.

VII

[10] The application of these principles to our original *Tibbs* decision does not offer an easy solution to the issue Tibbs presents, for a careful analysis would seem to indicate, candidly, that the opinion was—like the district court's decision in *Smith*—one of those rare instances in which reversal was based on evidentiary weight.

Tibbs' conviction rested primarily on the uncorroborated testimony of the rape victim, Cynthia Nadeau. Although this testimony alone was legally sufficient to support Tibbs' conviction under Florida law, *Thomas v. State*, 167 So.2d 309 (Fla.1964), we reversed his conviction due to a number of "infirmities in the evidence establishing Tibbs as the perpetrator" of the crime. Among these infirmities were several aspects of Nadeau's testimony which cast serious doubt on her believability. In effect, we reweighed the evidence supporting Tibbs' conviction and remanded for a new trial. Judged in light of today's decision, this action was clearly improper. Given the dilemma that error has created, we appear to have several alternatives.

First, we could simply apply the principles enunciated in today's decision, vacate our previous reversal, and affirm Tibbs' conviction. This alternative would prejudice Tibbs for our improper reweighing of the evidence, and for that reason it is not terribly attractive.

Second, we could discharge Tibbs on the ground that he is entitled to this relief from our earlier decision, since we there indicated our serious concern "that Tibbs had nothing to do with these crimes." *Tibbs v. State*, 337 So.2d 788, 791 (Fla.1976). Only by stretching the point, however, could we possibly use an "insufficiency" analysis to characterize our previous reversal of Tibbs' convictions.

14. *See, e. g., Wright v. State*, 348 So.2d 26 (Fla. 1st DCA 1977); *In re Tierney*, 328 So.2d 40 (Fla. 4th DCA 1976); *Kohn v. State*, 289 So.2d 48 (Fla. 3d DCA 1974); *Cleveland v. State*, 287 So.2d 347 (Fla. 3d DCA 1973). Other cases have granted new trials "in the interests of justice" without explicitly citing the rule. *See, e. g., Dukes v. State*, 356 So.2d 873 (Fla. 4th DCA 1978); *Ferber v. State*, 353 So.2d 1256 (Fla. 2d DCA 1978); *McClain v. State*, 353 So.2d 1215 (Fla. 3d DCA 1977).

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For these reasons the
Second District Court of
Tibbs, 370 So.2d 386 (Fla.
affirmed.

It is so ordered.

ADKINS, OVERTON,
McDONALD, JJ., concur.

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BOYD, J., dissents with

1. *State v. Smith*, 249 So.2

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A more sensible, third alternative, we believe, is to face squarely the double jeopardy implications of a pre-*Burks*, appellate reversal based on evidentiary weight. We recognize, of course, that this alternative will merely resolve Tibbs' particular situation, and will have little precedential effect on Florida's law after today's decision. Nonetheless, the interests of justice seem to require that we choose between a retroactive and artificial characterization of our earlier decision (an action we expressly declined to undertake in *Greene v. Massey*, 384 So.2d 24 (Fla.1980)), and a retroactive application of double jeopardy principles to an appellate reversal improperly entered.

Despite the broader focus which Justice Sundberg would have us adopt to resolve our dilemma, the fact remains that we cannot fairly conclude from our original opinion that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency. If they were not, then generalized double jeopardy concepts are of no value here, for the United States Supreme Court has now made relatively clear that *only* those appellate reversals tantamount to an acquittal for insufficient evidence prohibit retrial under *Burks*. *United States v. DiFrancesco*, —— U.S. ——, 101 S.Ct. 426, 433–37, 66 L.Ed.2d 328 (U.S.1980). Other appellate reversals, including those where sufficient evidence was adduced but a conviction was nonetheless vacated, apparently do not implicate double jeopardy principles.

For these reasons the decision of the Second District Court of Appeal in *State v. Tibbs*, 370 So.2d 386 (Fla. 2d DCA 1979), is affirmed.

It is so ordered.

ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., concurs in part and dissents in part with an opinion.

ENGLAND, J., concurs in part and dissents in part with an opinion.

BOYD, J., dissents with an opinion.

1. *State v. Smith*, 249 So.2d 16, 17 (Fla.1971).

SUNDBERG, Chief Justice, concurring in part and dissenting in part.

I concur in parts I through V of the majority opinion, but to the remainder I must respectfully dissent. Although the majority concedes that it is difficult if not impossible to characterize and thereby categorize the prior decisions of this Court and the district courts of appeal as to whether a reversal was based on "weight" as opposed to "sufficiency," nevertheless, our prior decision in this cause is dissected to conclude that the reversal was, in fact, based upon the weight and not the sufficiency of the evidence. Two aspects of this trouble me.

First, not only would such an act by the Court in our first decision have been "novel" [1] since there is no legal justification for such a procedure, but it would also have been unlawful. Regardless of how incorrect the conclusion in our first decision may now be perceived, nonetheless, our only authority to reverse the conviction based on the evidence, as an appellate court, was due to its insufficiency. We have consistently recognized that appellate courts may not reweigh evidence. They may only assess its sufficiency. *See Herzog v. Herzog*, 346 So.2d 56 (Fla.1977); *Shaw v. Shaw*, 334 So.2d 13 (Fla.1976); *Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla.1972). So now to characterize our former action as an erroneous reweighing of the evidence seems improvident at best.

Furthermore, I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed—yes or no, why or why not. The answer is ineluctably affirmative. The reason requires an examination of double jeopardy principles. Whether the first trial results in an acquittal, conviction or no verdict, a major purpose of protection against double jeopardy is to prevent the imposition of multiple trials upon the defendant. *See Price v. Georgia*, 398 U.S. 323, 331, 90 S.Ct. 1757, 1762, 26 L.Ed.2d 300

(1970). Because of its superior resources, the state must not be allowed to reprosecute *the defendant for* the same offense until it achieves the desired conviction. *See United States v. Scott*, 437 U.S. 82, 87, 98 S.Ct. 2187, 2191, 57 L.Ed.2d 65 (1978). The double jeopardy clause is aimed at checking prosecutorial discretion and at preventing abuse of criminal prosecution used as a means of government oppression. These purposes are well summarized in the oft-quoted passage from *Green v. United States*, 355 U.S. 184, 187–88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Central to the prohibition against double jeopardy is the barrier forbidding a "second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978) (footnote omitted). The state is not allowed a "second crack" at convicting a defendant when its first effort fell short of the mark because it somehow failed to present the proper evidence. *See Swisher v. Brady*, 438 U.S. 204, 216, 98 S.Ct. 2699, 2706, 57 L.Ed.2d 705 (1978). This is the rationale underlying *Burks* which recognizes that an appellate reversal for lack of evidence is tantamount to an acquittal. This is because such a decision by an appellate court constitutes "a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15, 98 S.Ct. at 2149.

Burks takes great care to distinguish the double jeopardy implications of appellate reversals due to trial error and those due to evidentiary insufficiency. Reversal and retrial because of trial error does not contravene double jeopardy principles because such a reversal implies nothing about the guilt or innocence of the defendant, but rather "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e. g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." *Id.* at 15, 98 S.Ct. at 2149. The distinction, therefore, is between reversal for a procedural trial error and reversal for a substantive lack of evidence to support the verdict.

The distinction made in *Burks* parallels that made in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), decided in the same term as *Burks*. In *Scott*, the Supreme Court held that double jeopardy protection could not be invoked by a defendant who had obtained dismissal of two counts of narcotics charges because of prejudice due to preindictment delay by the prosecution. The dismissal had been granted pursuant to a legal defense, not pursuant to a factual defense. The Supreme Court thus developed a definition of acquittal as " 'the ruling of the judge, whatever its label, [which] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' *Martin Linen* [*United States v. Martin Linen Supply Co.*, 430 U.S. 564] . . . at 571 [97 S.Ct. 1349 at 1354, 51 L.Ed.2d 642]." *Scott*, 437 U.S. at 97, 98 S.Ct. at 2197. Scott had obtained a dismissal because of a legal and not a factual deficiency in the government's case and was therefore not entitled to double jeopardy protection.

Our task, then, is to decide whether this Court's prior reversal of Tibbs' conviction[2] is more closely related to trial error or evidentiary insufficiency, and whether the reversal is based upon a legal defense or a factual defense. The problem is complicat-

2. *Tibbs v. State*, 337 So.2d 788 (Fla.1976).

ed by the nefarious creation in Florida case law of a theoretical third reason for appellate reversal, *viz.*, lack of evidentiary weight. Though this Court has never specifically recognized this reason for appellate reversals, at least two district court of appeal opinions have attempted to establish this as a basis for reversal. In *Sosa v. Maxwell*, 234 So.2d 690 (Fla. 2d DCA), *cert. denied*, 240 So.2d 640 (Fla.1970), *cert. denied*, 402 U.S. 951, 91 S.Ct. 1635, 29 L.Ed.2d 121 (1971), the district court sought to characterize this Court's prior reversal of a murder conviction as being based on lack of evidentiary weight. The district court attempted to avoid the growing trend it recognized in other states, which would not allow retrial after reversal based on evidentiary insufficiency. *Id.* at 692. Inherent in *Sosa* is the notion that the distinction the district court sought to establish between sufficiency and weight of the evidence had some meaning in terms of the applicability of the double jeopardy clause. Although the present majority rightly rejects the district court's characterization in *Sosa*, it paradoxically seeks to imply that the distinction used there is possessed of some significant meaning in terms of double jeopardy protection. We explicitly rejected this in *State v. Smith*, 249 So.2d 16 (Fla.1971), when the same district court again attempted to foist this ground for appellate reversal into Florida's case law.[3] The majority properly recognizes the weak support for this distinction and relegates it to history as an anomaly. The rejection of this third category of appellate reversal is supported by our recent decision in *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979), which firmly rejected the state's proffer of this basis as a means of avoiding double jeopardy application when we had reversed a murder conviction because the circumstantial evidence failed to rebut a hypothesis of innocence.[4]

Both opinions in *McArthur* and the present majority note that the United States Supreme Court did not directly address the issue with which we are faced when it decided *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), which applied the principles of *Burks* to the states. Both opinions point to a footnote, 437 U.S. at 26 n.10, 98 S.Ct. at 2155 n.10, where the Supreme Court declined to express a view on our specific problem. This lack of expressed opinion is the only significance I can find underlying the sufficiency-weight distinction which the majority develops, at least when the distinction is made at the appellate level. Yet the Supreme Court's refusal to decide whether double jeopardy protections are implicated under such a characterization does not necessarily imply that the principles of *Burks* and *Greene* are ipso facto inapplicable to our case. The issue is merely undecided, not uncontrolled by these two cases.

Having surmised that the sufficiency-weight distinction is useless in resolving the case before us, I return to the problem of aligning Tibbs' case on the side of either

3. Some of the basis for the creation of this third type of reversal, evidentiary weight, is exemplified in *Smith v. State*, 239 So.2d 284 (Fla. 2d DCA 1970), the case which we quashed in 249 So.2d 16 (Fla.1971). The district court pointed out that though Florida lacks a corroboration requirement for rape convictions, the *results* in Florida appellate courts do not differ from those states which do have such a requirement. *Id.* at 286. Since Florida courts could not create a corroboration requirement as Georgia courts had in *Davis v. State*, 120 Ga. 433, 48 S.E. 180 (1904), because of such precedent as *Doyle v. State*, 39 Fla. 155, 22 So. 272 (1897), they instead sought to create a separate category of appellate review based on evidentiary weight, implementing a de facto corroboration requirement. The Florida Legislature sought to stem this tide of judicial lawmaking by explicitly rejecting a corroboration requirement for a sexual battery conviction. § 794.022(1), Fla.Stat. (1979). A majority of states has rejected the corroboration requirement which had no basis in common law, though the district court in *Smith* assumed otherwise. *See* 15 Duq.L.Rev. 305, 313 (1977); 7 J. Wigmore, Evidence § 2061, at 451 (Chadbourn rev. 1978).

4. Tibbs' conviction did not rest entirely upon circumstantial evidence, so the standard requiring evidence which is inconsistent with any reasonable hypothesis of innocence set out in *Davis v. State*, 90 So.2d 629 (Fla.1956), and with which *McArthur v. State*, 351 So.2d 972 (Fla.1977), was concerned, is not here applicable.

trial error or evidentiary insufficiency, or alternatively on the side of either a legal defense or a factual defense. There can be no doubt that our original reversal of Tibbs' conviction was due to this Court's perception that the state had failed to establish the identity of Tibbs as the perpetrator of the murder and rape. This surely belongs in the category of evidentiary insufficiency and not trial error. Likewise, under the *Scott* distinction, the basis of the reversal was one going to a factual element of the case, identity, and was not a technical legal problem such as a preindictment delay by the prosecution. We were not concerned that Tibbs did not receive a procedurally fair trial; we were concerned with the insufficiency of a factual showing of identification. Under either the *Burks* or *Scott* distinction, Tibbs' case is therefore one which deserves protection from double jeopardy.

Finally, I turn to the practical problems that the majority's decision presents. The majority implies that the evidence was legally sufficient[5] to convict Tibbs and that therefore a retrial would not violate the fifth amendment since the state would not be allowed a second attempt at mustering evidence it had failed to produce at the first trial. But we must carry the principle of sufficient evidence through the retrial stage, since it is the basis for avoiding *Burks* and *Greene*. We cannot logically allow the state in a second trial to supplement the evidence presented at the first trial, at least not without completely ignoring the themes of the double jeopardy clause here outlined. Since the same evidence must be used, an appellate court would have no choice but once again to reverse a conviction because of our reversal under identical circumstances. This result would follow unless the majority's opinion were construed to reverse our reversal of Tibbs' conviction, in which case we should reinstate the original judgment to avoid double jeopardy problems. A second practical problem is created by the passage of seven years from the date of the crime. If the prosecutrix's identification of the defendant was suspect at the original trial, it is certainly unrealistic to presume on retrial that the passage of so many years will improve her perception.

Both of these problems lead to the conclusion that in spite of the appearance of allowing retrial, the majority has tacitly acquitted Tibbs. Rather than reach this result by tedious circumambulation, I would quash the decision of the District Court of Appeal, Second District, because retrial of the defendant violates the fifth amendment, recognizing that what we did in reversing Tibbs' conviction was to assess some form of factual deficiency in the evidence proving defendant's guilt.

ENGLAND, Justice, concurring in part and dissenting in part.

I concur fully with parts I through V of today's opinion. I dissent, however, from the Court's decision to allow a retrial for Tibbs. Rather than recycle Tibbs through the criminal justice system, I would direct his discharge in the interest of justice. Fla.R.App.P. 9.140(f).

BOYD, Justice, dissenting.

I dissent from the majority opinion allowing re-trial of Delbert Tibbs. It is my view that this result allows the State of Florida to again put petitioner in jeopardy of his life for crimes which the state has already attempted and failed to prove.

When petitioner originally appealed his conviction to this Court, I concurred in the judgment of the Court reversing and remanding for a new trial. *Tibbs v. State*, 337 So.2d 788, 792 (Fla.1976) (Boyd, J., concurring specially). My concurring opinion reveals my view, which I still hold, that when an appellate court judges the sufficiency of evidence to support a criminal conviction, it does so upon the whole record, and will therefore not always be bound by such general rules of sufficiency as the one pertaining to the uncorroborated testimony

5. This implication is inherent in the majority's position, since the only other stance would hold the evidence insufficient, and *Burks* and *Greene* would prevent retrial.

of a rape victim, stated in *Thomas v. State*, 167 So.2d 309 (Fla.1964). While such a rule of evidentiary sufficiency provides that the kind of evidence in question (e. g., uncorroborated identification of rape victim) may, as a matter of law, be sufficient, it does not preclude the appellate court from inquiring, upon the whole record, whether the verdict is supported by competent, substantial evidence. The inquiry is whether a jury of reasonable people could conceivably conclude from the evidence admitted that guilt was proved beyond a reasonable doubt. *See, e. g., Griffis v. Hill*, 230 So.2d 143 (Fla.1970). On the original *Tibbs* appeal, I also expressed my reluctance, since the conviction in my view was being reversed because of the insufficiency of the evidence, to concur in the Court's mandate allowing a new trial.

In *McArthur v. State*, 351 So.2d 972 (Fla. 1977), where it was clearer that the ground of reversal was evidentiary insufficiency, I dissented from that portion of the Court's decision holding that a new trial was permissible. *Id.* at 978 (Boyd, J., concurring in part and dissenting in part). When this Court later denied Nadean McArthur's petition to prohibit her retrial, *McArthur v. Nourse*, 358 So.2d 132 (Fla.1978) (prohibition denied without opinion), the United States Supreme Court granted certiorari, vacated the order, and remanded for reconsideration in light of *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) and *Burks v. United States*, 437 U.S. 1, 91 S.Ct. 2141, 57 L.Ed.2d 1 (1978). When this Court reconsidered the case, it concluded that the Double Jeopardy Clause would not allow another trial. *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979).

Greene and *Burks* now make clear that when an appellate court finds that a judgment cannot stand because the state has failed to carry its burden of proof, it is a violation of the Fifth and Fourteenth Amendments to allow the state to have another chance. I disagree, moreover, with the majority opinion's statement that "the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*." The reason that courts, in many of the cases cited by the majority, were so careful to characterize their decisions as reversals for lack of weight rather than legal insufficiency, was because of an understanding that Double Jeopardy disallowed retrial after reversal for insufficiency. *See, e. g., Sapir v. United States*, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 (1955); *Smith v. State*, 239 So.2d 284 (Fla.2d DCA 1970).

The Double Jeopardy Clause was written to prevent precisely what the Court's decision today allows—successive attempts by the state to prove its accusations. This Court's holding that the state failed to carry its burden in petitioner's trial, and that the conviction therefore could not stand, should now be seen as the equivalent of a judgment of acquittal, and be afforded the same finality as a jury verdict to that effect. Petitioner should be forever discharged from the accusations made against him.

Under my reading of the opinion of the Court, if the same evidence is presented against Tibbs on re-trial as was adduced at his first trial, he is found guilty, and he challenges the sufficiency of the evidence, the court having jurisdiction of the appeal will be obliged to hold the evidence sufficient to support a conviction. Yet when the previous judgment was before this Court on appeal, it was held that the same evidence was not enough to support the conviction. This flies in the face of principles of *res judicata* and, I repeat, violates the Double Jeopardy Clause. The Court is saying that we made a mistake when we reversed the original conviction, that we erred in our evaluation of the question of evidentiary sufficiency. I do not agree that we erred; even if we did, however, it is too late now to correct the error. In my view, the only error was in allowing a new trial.

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IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 3, 1981

DELBERT LEE TIBBS,	**	
Petitioner,	**	CASE NO. 56,918
vs.	**	District Court of Appeal, 2nd District - No. 78-1598
STATE OF FLORIDA,	**	
Respondent.	**	

On consideration of the motion for rehearing filed by attorney for petitioner

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., Concur
SUNDBERG, C.J., BOYD and ENGLAND, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. William A. Haddad, Clerk
Hon. Sal Geraci, Clerk
Hon. Jack R. Schoonover, Judge

Louis R. Beller, Esquire
Charles Corces, Jr., Esquire

APPENDIX B

Delbert TIBBS, a/k/a Delbert Johnson, Appellant,

v.

STATE of Florida, Appellee.

No. 47258.

Supreme Court of Florida.

July 28, 1976.

Rehearing Denied Sept. 28, 1976.

Defendant was convicted in the Circuit Court, Lee County, Thomas Shands, J., of rape and of murder in the first degree, and he appealed. The Supreme Court, England, J., held that circumstances indicating that except for testimony of victim, not one shred of evidence was developed to place defendant in area at any time, let alone on or near date of crimes, that no trace was ever found on truck which victim stated was driven by defendant when she and other victim were picked up and taken to scene of crime, that no gun or car keys were ever found in defendant's possession, at scene of crime, or elsewhere, and that no evidence was introduced to cast doubt on defendant's veracity, when considered with facts that several features of victim's testimony cast doubt on her believability and that defendant cooperated fully with officers, were insufficient to establish defendant as perpetrator of crimes.

Reversed and remanded.

Boyd, J., concurred specially and filed opinion.

Roberts, J., dissented and filed opinion in which Overton, C. J., and Adkins, J., concurred.

1. Criminal Law ⇐566

Testimony of victim of crimes was inherently unreliable where, despite her assertions that adequate daylight was present at time of alleged crimes to impress defendant's features and characteristics into her mind, all independent evidence of events indicated that crimes occurred after nightfall and, in addition to victim's admitted use of marijuana throughout the day and immediately prior to the crimes, the manner in which defendant was first identified through the use of three photographs suggested a less reliable identification than would have been possible had multiple photographs of more than one person been utilized. (Per England, J., with two Judges concurring and one Judge concurring specially.)

2. Criminal Law ⇐555

No credence could be given to the testimony of defendant's cell mate to the effect that defendant confessed to the crimes where testimony appeared to be the product of purely selfish considerations. (Per England, J., with two Judges concurring and one Judge concurring specially.)

3. Criminal Law ⇐1134(1)

It is the obligation of the Supreme Court to review a conviction for which the death sentence has been imposed to determine if the ends of justice require a new trial. (Per England, J., with two Judges concurring and one Judge concurring specially.) West's F.S.A. § 921.141(4); 32 West's F.S.A. Florida Appellate Rules, rule 6.16(b).

4. Rape ⇐54(1)

No corroborative evidence is required in a rape case when the victim can testify directly to the crime and identify her assailant. (Per England, J., with two Judges concurring and one Judge concurring specially.)

5. Rape ⇐54(1)

Rule that no corroborative evidence is required in a rape case when the victim can testify directly to the crime and identify her assailant was also applicable to the rape-murder crimes with which defendant was charged. (Per England, J., with two Judges concurring and one Judge concurring specially.)

6. Rape ⇐54(1)

Application of rule that no corroborative evidence is required in a rape case when victim can testify directly to crime

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and identify her assailant is limited by proposition that victim's testimony must be carefully scrutinized so as to avoid an unmerited conviction when victim is the sole witness to the crime. (Per England, J., with two Judges concurring and one Judge concurring specially.)

7. Homicide ⇐234(1)
Rape ⇐51(7)

Circumstances indicating that except for testimony of victim, not one shred of evidence was developed to place defendant in area at any time, let alone on or near date of alleged rape and murder, that no trace was ever found of truck which victim stated was driven by defendant when she and other victim were picked up and taken to scene of crimes, that no gun or car keys were ever found in defendant's possession, at scene of crime, or elsewhere, and that no evidence was introduced to cast doubt on defendant's veracity, when considered with facts that several features of victim's testimony cast doubt on her believability and that defendant cooperated fully with officers were insufficient to establish defendant as perpetrator of crimes. (Per England, J., with two Judges concurring and one Judge concurring specially.)

8. Criminal Law ⇐1189

The Supreme Court is committed to the rule that a conviction will be reversed and a new trial ordered where the evidence relied on is not satisfactory to establish the identity of accused as a participant in a crime of which he has been found guilty. (Per England, J., with two Judges concurring and one Judge concurring specially.)

George C. Howard, of Howard & Mann, Chicago, Ill., for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

ENGLAND, Justice.

This cause is before us on direct appeal to review the convictions of Delbert Tibbs for rape and murder in the first degree. Tibbs was sentenced to life imprisonment and to death, respectively. We have jurisdiction under Article V, Section 3(b)(1) of the Florida Constitution, and Section 921.141, Florida Statutes (1975).

Tibbs was charged in a three count indictment with the rape of Cynthia Nadeau, the premeditated murder of Terry R. Milroy, and the crime of felony murder for killing Milroy while raping Nadeau. A jury trial was held which resulted in conviction for rape and first degree murder. A death sentence was recommended by the jury for murder, and the trial judge imposed the death penalty for that crime.

The relevant facts of the alleged crime, as brought out on trial, were these. Nadeau and Milroy were hitchhiking to Marathon from St. Petersburg, when they were picked up in Fort Myers by a man alleged to be driving a green truck with a rounded hood, black vinyl seats, no door handle, and an oil light that blinked on and off. This man drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where the driver was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay. Milroy pleaded with the driver not to kill him, but the man shot him again, inflicting the fatal wound. The driver then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered to get out and walk in front of the truck. She left the truck, but was able to run and successfully escape.

[1, 2] Tibbs' principal contention to this Court is that the totality of evidence at trial was insufficient to place him at or near the scene of the murder and rape at the time they occurred, or to establish his identity as the perpetrator beyond all reasonable doubt. Specifically he states that there is no evidence to corroborate the testimony of Cynthia Nadeau, the 17-year old rape victim, and that her testimony is so

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riddled with conflicts and is so inherently unreliable that his conviction and attendant death sentence should be reversed. Tibbs also contends, and we agree after reading the transcript, that no credence can be given to the testimony of Tibbs' Lee County jailmate, serving a life sentence for rape, to the effect that Tibbs confessed to the crime. This testimony appears to be the product of purely selfish considerations.

[3] Under Section 921.141(4), Florida Statutes (1975), and Fla.App. Rule 6.16(b), it is our obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a new trial. Our review of the record of this proceeding leaves us with considerable doubt that Delbert Tibbs is the man who committed the crimes for which he has been convicted. Since the principal testimonial evidence against Tibbs came from Nadeau, we begin with the legal rules governing its reliability.

[4-6] The law in Florida appears well established to the effect that no corroborative evidence is required in a rape case when the victim can testify directly to the crime and identify her assailant. *Thomas v. State*, 167 So.2d 309 (Fla.1964). Obviously this rule also applies to the rape-murder crimes with which Tibbs was charged. The policy reasons for this rule are sufficiently apparent that they need not be reiterated or re-examined here. The limitation to its application, however, is "that where the sole witness is the prosecutrix, her testimony must be carefully scrutinized so as to avoid an unmerited conviction." *Thomas*, above, at 310.

[7] In this case, we find the following infirmities in the evidence establishing Tibbs as the perpetrator of these crimes:

(1) Except for the testimony of Nadeau, not one shred of evidence was developed to place Tibbs in the Ft. Myers area at any time, let alone on or near February 3, 1974, the date of the crimes. Admittedly Tibbs was not a public or social figure who would have made acquaintances or attracted attention, but with the publicity attending the crimes and the discovery methods available to the state, surely someone might have been found who could (at least tentatively) have identified Tibbs as having come to Ft. Myers, eaten in Ft. Myers, passed through Ft. Myers, or at least been seen walking or riding in Ft. Myers. No such person was brought forward, and only Cynthia Nadeau's testimony puts this man in that area of Florida. In contrast, undisputed evidence established Tibbs' presence in Daytona Beach on the night of February 1 and the morning of February 2, in Leesburg on February 6, and in Ocala on February 7. Except Nadeau's testimony, there is no evidence to place Tibbs in the southwest corner of the state during this five day interval.[1]

(2) No trace was ever found of the truck which Nadeau stated was driven by Tibbs when she and Milroy were picked up in Ft. Myers and taken to the scene of the crimes. Despite her specific testimony as to the color of the truck, its type and its special characteristics (no right door handle, rounded hood, blinking oil light), and the additional fact that her description was given to the police within an hour of Milroy's death and her alleged rape, the police were unable to locate any vehicle like the one she described despite an exhaustive car and helicopter search of the area. This fact can be evaluated against the uncontroverted evidence that Tibbs was on the other side of Florida in Daytona Beach, the morning of the day before the crimes and at that time possessed no vehicle for his use.

(3) No gun or car keys were ever found in Tibbs' possession, at the scene of the crime, or elsewhere. When Tibbs was

1. The state introduced records from the Orlando Salvation Army which would have placed Tibbs in that area on the night of February 4. Without passing on Tibbs' assertion that the signature on the card was not his (which a superficial comparison with his admitted signature on a like record from the Daytona Beach Salvation Army seems to bear out), Orlando is still the nearest place to Ft. Myers, geographically and in time, that the state was able to place him, except of course for Nadeau's testimony.

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...pped by police officers in Florida and ...issippi (February 6 in Lucsburg, Febru... 7 in Ocala, and March 13 in Clarksdale, ...issippi) he was afoot, and there was no ...idence that he had either owned or oper... a motor vehicle.

(4) On the three occasions when Tibbs ...as stopped by police on the basis of the ...escription issued by Nadeau, he cooperated ...lly with the officers by providing all in... ...rmation and identification they request... ...d, by allowing himself to be photographed, ...nd on the last occasion by waiving extradi... ...ion in Mississippi to voluntarily return to ...Florida to face rape and murder charges in ...Ft. Myers.

(5) No evidence was introduced which ...asts doubt on Tibbs' veracity. He did not ...have a previous criminal record and he had ...never been arrested, except possibly for a ...traffic violation. Evidence was introduced ...from people in his home town, including a ...minister and elected state officials, that he ...was a law-abiding citizen.

(6) Several features of Nadeau's testimo... ...ny, when considered with other evidence in ...the record independently established and ...uncontroverted, cast doubt on her believa... ...bility. For one, despite her assertions that ...adequate daylight was present at the time ...of the alleged crimes to impress Tibbs' fea... ...tures and characteristics into her mind, all ...independent evidence of the events indi... ...cates that the crimes occurred after night... ...fall. For another, her admitted use of mar... ...ijuana throughout the day and immediately ...prior to the crimes casts doubt on her iden... ...tification of Tibbs. Thirdly, the manner in ...which Tibbs was first identified ten days ...after the crimes, by bringing Nadeau to Ft. ...Myers from St. Petersburg after she had ...reestablished herself in that community, in ...order to see three photographs of Tibbs, ...suggests a less reliable identification than ...would have been possible with multiple pho... ...tographs of more than one person. . . .

[8] We recognize that the resolution of factual issues in a criminal trial is peculiar... ...ly within the province of a jury, but in this ...case a man's life has been placed in jeopar... ...dy and the Florida Legislature has directed that we review the "entire record". Our obligation now is no less than it was when Odie McNeil was sentenced to life imprisonment in 1932 and this Court said:

"Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt. This is especially true in a case where life imprisonment is the penalty imposed. *Heath v. State*, [97 Fla. 330, 120 So. 846] supra. And where the evidence of identity of the accused as being the guilty party is not satisfactory to the appellate court, a new trial will be granted. *Nims v. State*, [70 Fla. 530, 70 So. 565] supra.

In this case the sole testimony identifying the defendant McNeil as a participant in the robbery was given by the witness Rahming.

While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also the rule that the evidence relied on to have this effect must be substantial in character.

When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an accused as a participant in a crime of which he has been found guilty." *McNeil v. State*, 104 Fla. 360, 139 So. 791, 792 (1932).

Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial.

SUNDBERG and HATCHETT, JJ., concur.

BOYD, J., concurs specially with an opinion.

ROBERTS, J., dissents with an opinion.

OVERTON, C. J., and ADKINS, J., dissent and concur with ROBERTS, J.

BOYD, Justice (concurring specially).

I concur in the majority opinion by Justice England vacating the conviction and sentence and requiring a new trial. I base this conclusion upon the weakness and inadequacy of the testimony against appellant given in the trial court.

In each instance before the death penalty may be imposed under Florida law this Court, far from the scenes of the crimes and pressures of the trial court proceedings, and with clinical objectivity, evaluates the record. We must determine whether such convicted persons are to be executed, imprisoned or set free.

Under Anglo-American standards of criminal justice the record in this case does not, in my judgment, support the imposition of either capital punishment or imprisonment.

In the case of *Griffis v. Hill*, 230 So.2d 143 (Fla.1969) this Court held that:

"The test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict."

The major corroborating witness for the State is a convicted rapist who admitted under oath in this trial proceeding that he had testified falsely under oath in connection with his prior trial relating to his guilt and his ability to pay legal counsel. The witness testified that he was angered because a state investigator had accused him of being a liar and at first refused to consider the testimony which he wanted to give against appellant to the effect that appellant had made an admission of guilt to him while they were in jail together. It should have been obvious that the witness was attempting by his testimony to benefit himself in connection with his own imprisonment. The eyewitness testimony of the rape victim is the only testimony having any merit whatever, but it is not supported by even the slightest additional testimony placing appellant within 150 miles of the scene of the crime when it occurred. The mysterious truck in which the rape victim testified she and her attacker had smoked marijuana cigarettes could never be found, although the other convicted rapist claimed that appellant had told him the truck had been abandoned when it ran out of gas between Fort Myers and Miami. The testimony further shows that on the fateful day of the crimes, the rape victim had smoked marijuana cigarettes on several occasions during the day and was under the influence of marijuana at the time the crimes were committed. Immediately after the crime she resumed her status as the "common law wife" of the man whom she had deserted in St. Petersburg when she eloped with the murder victim. Although she personally identified appellant from pictures, in a line-up and at trial, the testimony given by the rape victim immediately after the crime gave a description of a ruffian whose language, personality and physical appearance conflicted substantially with that of the appellant who was identified at the trial by Chicago public officials and professional people as having a good reputation and being a law abiding citizen.

Although the weakness of the evidence presented in the trial court might well require that the appellant be released from incarceration without further litigation, it is my understanding that Florida law permits a new trial and I, therefore, reluctantly concur in the majority opinion providing for such new trial.

ROBERTS, Justice (dissenting).

I must respectfully dissent.

Appellant was charged in a three count indictment with rape in that he did unlawfully and feloniously ravish and carnally know a female of more than ten years of age, to-wit: Cynthia Nadeau, by force and against her will, with murder in the first degree in that he did unlawfully, feloniously and from a premeditated design to effect the death of Terry R. Milroy, did shoot Milroy with a deadly weapon—a pistol—thereby inflicting a mortal wound from which Milroy died; and with felony murder

in that he did unlawfully and feloniously kill Milroy while perpetrating the rape of Cynthia Nadeau. The jury returned a verdict of guilty of rape, and guilty of murder in the first degree and recommended the death penalty. The trial court adjudicated him guilty of murder in the first degree and rape and sentenced him to consecutive sentences of death and life.

Hitchhiking to Marathon, Florida, from St. Petersburg, Cynthia Nadeau and Terry Milroy were picked up in Fort Myers by a man, identified as the defendant, driving a green truck with a rounded hood, black leather vinyl seats, no door handle, with the oil light going on and off. Defendant drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where defendant was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay. Milroy pleaded with defendant not to kill him, but defendant shot him again inflicting the mortal wound which caused Milroy's death. Defendant then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered by defendant to get out and walk in front of the truck. She did exit the truck but ran and successfully escaped.

Appellant has raised several points on appeal relating to the identification procedure employed by the State, the jury venire, testimony of the prosecutorial identifying witness, introduction into evidence of the polygraph test contained in the police report, alleged forgery of registration card at the Salvation Army Center in Orlando, alleged perjured testimony of the corroborating witness Tibbs, brief period of time in which jury deliberated before returning its verdict of guilty as charged, and the constitutionality of the death penalty.

Subsequent to the rape and murder, Nadeau gave a detailed description of her assailant. Because he fit the description, the defendant was stopped several times for questioning. Appellant explains that the complaining witness, having previously been unable to identify her assailant from photograph identification albums provided by the police, was presented with two photographs of the defendant whom she identified as her assailant. She later identified him in a four-man lineup and again at trial. Appellant argues that the photographic identification by Cynthia Nadeau who identified appellant as her assailant and the murderer of Milroy so tainted the subsequent lineup and trial identifications as to deprive him of due process of law because this procedure was so suggestive as to give rise to a real likelihood of irreparable misidentification.

The prosecutrix in *Chaney v. State*, 267 So.2d 65 (Fla.1972), identified her assailant when presented with a single photograph of him by the Sheriff's deputy. Subsequently, she identified him from a lineup. Taking into consideration the circumstances surrounding the identification and the guidelines set out by the Supreme Court of the United States to ensure against misidentification, this Court held that the identification procedures employed were not so fatally tainted to deprive appellant of due process of law. Therein, this Court explained:

"Within the latitude of the particular facts of this case and taking them all into consideration, as we may do under the guidelines of the Supreme Court of the United States, it does not appear to us that the identification procedures employed herein were fatally tainted to the point of depriving Appellant of due process of law.

"It is true that a single photograph of Appellant was shown prosecutrix by the sheriff's deputy, because she told him Appellant had revealed to her he had been jailed for raping another girl. Pursuant to this revelation, it is logical that the police would show prosecutrix a photograph of a suspect in another rape case who had been jailed as a lead in identifying and arresting the person suspected of committing the crime of rape upon the prosecutrix. Under these circumstances,

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it was not an abuse of due process rights to use the single photograph as a clue or lead in apprehending the rapist of prosecutrix. In fact, it would be unreasonable to preclude the use of such a photograph for this pre-arrest purpose.

"*Moreover, the fact that prosecutrix had opportunity to see her assailant over a period of several hours, including daylight of the day succeeding his original attack upon her, is such an overwhelming circumstance of independent origin as to discount the suggestion that only through means of the photograph prosecutrix was able to identify Appellant.* Corroborating latent fingerprints extracted from furnishings and items in the trailer where the rape occurred were identified as belonging to Appellant.

"We conclude that the totality of the particular circumstances of this case does not disclose that prosecutrix's identification of Appellant was fatally tainted to the point of denial of his rights of due process." (Emphasis supplied)

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), which involved a victim's identification of the defendant at a stationhouse showup which occurred seven months after the rape, the Supreme Court determined that, although the stationhouse identification may have been suggestive, under the totality of circumstances, the victim's identification was reliable and was properly allowed to go to the jury. First discussing the past precedent relative to the scope of due protection against the admission of evidence deriving from misidentification procedures,[1] the Supreme Court delineated guidelines to be considered relative to the relationship between suggestiveness and misidentification, as follows:

"It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S., at 384, 88 S.Ct., at 971. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning

1. "In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the Court held that the defendant could claim that 'the confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.' Id., at 301-302, 87 S.Ct., at 1972. This, we held, must be determined 'on the totality of the circumstances.'

We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hospital room, and also made an in-court identification.

"Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

"'[W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

"Again we found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

* * * * * *

"In the most recent case of *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), we held admissible an in-court identification by a witness who had a fleeting but 'real good look' at his assailant in the headlights of a passing car. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. Mr. Justice Brennan for four members of the Court stated that this evidence could support a finding that the in-court identification was 'entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup.' 399 U.S., at 5-6, 90 S.Ct., at 2001."

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the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. [*Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402.] Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.

"What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. *Clemons v. United States*, 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (Leventhal, J., concurring); *cf. Gilbert v. California*, 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

"We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Upon consideration of these guidelines, the Supreme Court concluded:

"We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had 'no doubt' that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face 'I don't think I could ever forget.' App. 127.

"There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had

previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury."

Applying the factors described in *Neil v. Biggers*, supra, appellee states that Nadeau's identification was reliable and was properly submitted to the jury. I agree.

Although appellant originally objected to the jury venire at the commencement of trial proceedings, he subsequently expressly withdrew the objection to the venire after the jury was selected. The following is reflected by the record:

"THE COURT: Mr. Howard, for the record, are you withdrawing your objection that you made yesterday?

"MR. HOWARD: Yes.

"MR. LONG: For the record, Mr. Howard, you are withdrawing the objection to the venire as it appeared in the courtroom as of yesterday?

"MR. HOWARD: Yes.

"MR. LONG: Thank you very much, Mr. Howard.

"THE COURT: Is the State ready to proceed?

"MR. LONG: Yes.

"THE COURT: Defense ready to proceed?

"MR. HOWARD: Yes."

Accordingly, appellant can not now complain of reversible error on this ground. In *State v. Silva*, 259 So.2d 153 (Fla.1972), this Court held:

"Such an objection comes too late after verdict and has no place in a motion for new trial or in arrest of judgment. By going to trial before a jury without any objections, a defendant waives all irregularity in the drawing, summoning and impaneling of such jurors. *Green v. State*, 60 Fla. 22, 53 So. 610 (1910); *Lake v. State*, 100 Fla. 386, 129 So. 833 (1930); 14 F.L.P., Jury, § 111; 20 Fla.Jur., Juries, § 68."

Appellant contends that the introduction into evidence of the police report which included results of a polygraph test given to Miss Nadeau and other hearsay evidence was error. The defense used the police report extensively in cross-examination of a witness. Thereafter the State moved to introduce the report into evidence. The trial judge then specifically inquired of defense counsel whether there was any objection to the introduction of the report to which defense counsel responded that he had no objection. The following appears in the record:

"MR. LONG: Your Honor, at this time I would move to introduce the investigator's report into evidence that Mr. Wallace has been testifying from.

"MR. HOWARD: Well, excuse me Judge, I don't want to argue the matter. May we approach the bench?

"THE COURT: You have seen it. Do you have any objection? If you have an objection then we will return the jury back to the jury room. That's what we usually do. Do you have any objection to it being introduced?

"MR. HOWARD: *No, sir. That is all right.*

"MR. LONG: Thank you.

"THE COURT: All right. Mr. Clerk, please mark the investigator's report into evidence carrying the same number." (Emphasis supplied)

The report was thereby stipulated into evidence. I find no reversible error as to this point. Cf. *Codie v. State*, 313 So.2d 754 (Fla.1975); *Woods v. State*, 285 So.2d 650 (Fla.App. 3, 1973).

I have carefully considered the several other points on appeal presented by appellant and find none to be meritorious so as to constitute reversible error.

I have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and I have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that I find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial

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be awarded. Cf. *State v. Dixon*, 283 So.2d 1 (Fla.1973); *Alford v. State*, 307 So.2d 433 (Fla.1974).

The jury recommended and the trial judge, upon considering all the mitigating and aggravating circumstances, agreed that the death penalty be imposed for the commission of this atrocious and heinous crime. I find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause.

I, therefore, respectfully dissent.

OVERTON, C. J., and ADKINS, J., concur.



STATE of Florida, Petitioner,

v.

Frederick Lamar BENTON, Respondent.

No. 46926.

Supreme Court of Florida.

Sept. 16, 1976.

Defendant was convicted in the Circuit Court, Sarasota County, Roy E. Dean, J., after waiver of jurisdiction by juvenile court, of robbery. Defendant appealed, and the District Court of Appeal, Grimes, J., 307 So.2d 198, reversed. The State petitioned for certiorari, and the Supreme Court, Overton, C. J., held that where the 16-year-old defendant was arrested on July 10 but not brought to trial until the following January 16, and where none of the delay was attributable to defendant, defendant was entitled to discharge under the 180-day speedy trial rule even though the juvenile court did not waive jurisdiction until September 19.

Decision of the Second District approved and writ discharged.

1. Criminal Law ⇐576(1)

Where 16-year-old defendant was arrested on July 10 and not brought to trial until the following January 16, and where none of the delay was attributable to defendant, defendant was entitled to discharge under the 180-day speedy trial rule even though the juvenile court did not certify defendant for trial as an adult until September 19. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.191; Rules of Juvenile Procedure, rule 8.120; West's F.S.A. § 39.03(7).

2. Criminal Law ⇐575

The State must be prepared to proceed to try a juvenile who has been certified to be tried as an adult within 180 days from the time the juvenile is taken into custody. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.191; Rules of Juvenile Procedure, rule 8.120; West's F.S.A. § 39.03(7).

Robert L. Shevin, Atty. Gen., and Robert J. Landry, Asst. Atty. Gen., for petitioner.

Jack O. Johnson, Public Defender, and Dennis P. Maloney, Asst. Public Defender, for respondent.

OVERTON, Chief Justice.

This cause is a petition for certiorari to review a decision of the Second District Court of Appeal reported at 307 So.2d 198 (Fla.App.2d 1975). We find conflict with *State v. Bryant*, 276 So.2d 184 (Fla.App.1st 1973). We have jurisdiction.[1]

[1] The respondent committed a robbery on July 10, 1973, at age 16. He was arrested the same day and was detained in a juvenile facility. On September 19, 1973, the court certified respondent for trial as an adult. On January 9, 1974, the respondent moved for discharge for failure to comply with the 180-day speedy trial rule. The trial court denied the motion. Respondent thereupon was tried and convicted in a jury

1. Art. V, § 3(b)(3), Fla.Const.

C/D

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SUPREME COURT OF THE UNITED STATES

DELBERT LEE TIBBS

Appellant-Petitioner

NO. 81-5114 (9)

vs.

STATE OF FLORIDA

Appellee-Respondent

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, the Appellant-Petitioner's attorney, LOUIS R. BELLER and moves this Court to appoint him as attorney in the prosecution of this appeal and for reasons thereto would state:

1. That he has been the Petitioner's attorney on appeal throughout the State's proceedings.

2. That he is a member of the bar in good standing, of the U.S. Supreme Court.

3. That he is a practicing attorney in the State of Florida, since 1957.

4. That it is the desire of Delbert Lee Tibbs, that Mr. Beller be appointed as his counsel to represent him in this appeal and an affidavit in regard to same is being forwarded from Chicago, Mr. Tibb's home.

5. That it will expedite the preparation of this case, if such appointment were made.

6. That this case is proceeding in forma pauperis, and that Mr. Tibbs has no funds with which to employ other counsel.

Respectfully submitted,

LOUIS R. BELLER, ESQ.
Attorney for Petitioner

LOUIS R. BELLER
ATTORNEY & COUNSELLOR AT LAW
[illegible] LINCOLN RD.
SUITE 330
MIAMI BEACH, FLA. 33139

AFFIDAVIT OF SERVICE

I, LOUIS R. BELLER, attorney for DELBERT L. TIBBS, Petitioner, having been duly sworn, depose and say that I have served a copy of each of the following by mail, in accordance with Rule 28 of The Rules of the Supreme Court, upon all parties required to be served, and said parties are: Opposing Counsel JIM SMITH, Attorney General, State of Florida, Attention DEBORAH A. OSMOND, Assistant Attorney General, Park Trammell Building, 804, 1313 Tampa Street, Tampa, Florida 33602, this 11 of January 1981.

Documents served:

(1) MOTION FOR APPOINTMENT OF COUNSEL

SWORN AND SUBSCRIBED before me, a Notary Public in and for the State of Florida.

Notary

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APRIL 2 1985
BONDED THRU GENERAL INS. UNDERWRITERS

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Joint Appendix

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CLERK

No. 81-5114

In the Supreme Court of the United States

OCTOBER TERM, 1981

DELBERT LEE TIBBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JULY 22, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

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RELEVANT DOCKET ENTRIES

1. Motion to Dismiss, Case No. 74254 CF, filed July 20, 1978.
2. Order of Dismissal, Case No. 74254 CF, filed July 27, 1978.

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

Case No. 74-254 CF

STATE OF FLORIDA, PLAINTIFF

—*vs*—

DELBERT LEE TIBBS, DEFENDANT

MOTION TO DISMISS

COMES NOW the Defendant by and through his undersigned attorney, and moves this Court to dismiss the above-styled Cause and for reasons thereto would state:

I.

That the Defendant's original conviction in this Cause was reversed by the Florida Supreme Court on July 28, 1976. *Tibbs* v. *State of Florida* 337 So2d 788. The majority of opinion was written by Justice England, concurred with by Justices Sundberg and Hatchett, and specially concurred with by Justice Boyd, who wrote a separate opinion. Justice England found the totality of the record insufficient to convict and the principal witness's testimony essentially unbelievable without further corroboration. At Page 791 Justice England said:

> "Several feature's of Nadeau's testimony, when considered with other evidence in the record independently established and uncontroverted, cast doubt on her believability. For one, despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs' features and

characteristics into her mind, all independent evidence of the events indicates that the crimes occurred after nightfall. For another, her admitted use of marijuana throughout the day and immediately prior to the crimes casts doubt on her identification of Tibbs. Thirdly, the manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than would have been possible with multiple photographs of more than one person."

Justice England went on to say:

"Our obligation now is no less than it was when Odie McNeil was sentenced to life imprisonment in 1932 and this Court said: "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt. This is especially true in a case where life imprisonment is the penalty imposed. *Heath* v. *State* 97 Fla.330, 120 so.846. supra. And where the evidence of identity of the accused as being the guilty party is not satisfactory to the appellate court, a new trial will be granted. *Nims* v. *State* (70 Fl.530 70 So.565). supra.

In this case the sole testimony identifying the defendant McNeil as a participant in the robbery was given by the witness Rahming.

While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also

> the rule that the evidence relied on to have this effect must be substantial in character.
>
> When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an accused as a participant in a crime of which he has been found guilty." *McNeil* v. *State* 104 Fla. 360, 139 So. 791, 792 (1932).
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial."

II.

It is clear from the above quotes that the major reason for reversal was lack of enough evidence to convict. This was made even clearer by Justice Boyd's concurring opinion, in which Justice Boyd, at Page 792 said:

> "Although the weakness of the evidence presented in the trial court might well require that the appellant be released from incarceration without further litigation, it is my understanding that Florida law permits a new trial and I, therefore, reluctantly concur in the majority opinion providing for such new trial."

III.

It was Justice Boyd's and the Supreme Court's opinion at the time, that a new trial should be given under appropriate Florida law. Since that time, on June 14, 1978, the Supreme Court of the United States decided two cases, *Greene* v. *Massey*, Correctional Superintendent, Case Number 76-6617, and *Burks* v. *United States* decided the same day, and referred to in *Greene* v. *Massey*. In this case it was held that once a reviewing court has reversed by determining that the evidence at trial is insufficient to sustain the verdict, double jeopardy applies,

and the Defendant cannot be retried. In the Greene case, Defendants Greene and Sosa were indicted for first-degree murder, found guilty and sentenced to death. On appeal, the Florida Supreme Court reversed the convictions and new trials were ordered. A majority of the Court, composed of four justices, joined a brief per curiam opinion and disposed of the case in the following terms:

> "After a careful review of the voluminous evidence here we are of the view *that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree*, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial." *Sosa* v. *State*, 215 So. 2d 736,737 (1968). (Emphasis added).

IV.

Quoting from *Greene* v. *Massey* at Page 5, Slip Opinion

> "In *Burks* v. *United States*, ante, at ——, decided today, we have held that the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict. Since the constitutional prohibtion against double jeopardy is fully applicable to state criminal proceedings, *Benton* v. *Maryland*, supra, we are bound to apply the standard announced in *Burks* to the case now under review."

V.

There is some question in the *Greene* v. *Massey* supra as to whether or not all the justices of the Florida Supreme Court had concurred with reversing for lack of evidence at the initial trial, since three justices specially qualified their actions by specially concurring in an opinion which discussed only trial error. There is no question in the Tibbs case that Justices England, Sundberg, and

Hatchett concurred in the majority opinion of insufficiency of evidence and Justice Boyd's special concurrence went even further. Justice Boyd in his special concurrence stated that he would discharge the Defendant except that he did not think he could under the law.

VI.

The Supreme Court of the United States has now enunciated an opinion clearly and unequivocally in its Syllabus of *Greene* v. *Massey* at Page 1 on the Slip Opinion: Held: *Burks* v. *United States*, ante, p.——, precludes a second trial once a reviewing court has determined that the evidence introduced at trial is insufficient to sustain the verdict."

The Florida Supreme Court went into great detail as to why it did not consider the original evidence sufficient to convict Delbert Tibbs, therefore under authority of *Greene* v. *Massey* supra, and *Burks* v. *United States*, this Court should dismiss the indictment against Delbert Tibbs.

Respectfully submitted

/s/ Louis R. Beller
LOUIS R. BELLER
Attorneys for Defendant

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

Case No. 74-254 CF

STATE OF FLORIDA, PLAINTIFF

—*vs*—

DELBERT LEE TIBBS, DEFENDANT

ORDER

THIS CAUSE came on to be heard on July 20, 1978, on the Defendant's motion to dismiss the indictment filed herein on the ground of double jeopardy.

The Defendant urges the Court to find that the Fifth Amendment to the Constitution of the United States which provides in part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ," provides protection to him in this case, and that since the Florida Supreme Court reversed his original conviction on the ground that there was not sufficient evidence to sustain the jury verdict, he cannot be tried again.

The United States Supreme Court in 1969 ruled that the Fifth Amendment, through the Fourteenth Amendment, applied to the individual States of the Union. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

Prior to June 14, 1978, double jeopardy did not apply when a case was reversed on the basis of the insufficiency of evidence, if the Defendant had requested a new trial. *Greene* v. *Massey*, 546 F.2d 51 (1977). *Tibbs* v. *State*

of Florida, 432 F.Supp. 1045 (1977). *Sosa and Greene* v. *State*, 215 So.2d 736 (Fla. 1968).

However, on June 14, 1978, the United States Supreme Court decided the cases of *Greene* v. *Massey* (76-6617), and *Burks* v. *United States* (76-6528). In those cases, the Supreme Court held that the double jeopardy clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the jury's verdict. The Court further held that the principle applied even if the Defendant had moved for a new trial, as was done by Mr. Tibbs in this case.

The State has stipulated that this case was not reversed by the Supreme Court of Florida because of any trial error. If this had been the case, the result reached here would have been different.

The State contends that the Supreme Court in this case reversed and ordered a new trial on the grounds of the weight of the evidence, and not because of the sufficiency of the evidence, and, therefore, the recent rulings do not apply.

It would appear that the State could find support for this argument in a case involving the same Mr. Greene. In reversing Mr. Greene's original conviction, the Florida Supreme Court stated: "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that defendants committed murder in the first degree, and that the interests of justice require a new trial." *Sosa and Greene* v. *State*, 215 So.2d 736, 737 (Fla. 1968). Subsequently, Mr. Greene advanced the double jeopardy argument to the Florida Appellate Courts. *Sosa and Greene* v. *Maxwell*, 234 So.2d 690 (Fla. DCA 2d 1970). In that case, based upon the above-mentioned wording, the Court stated that Greene and Sosa had not made a clear showing that the reversal by the Florida Supreme Court was based on the insufficiency of the evidence. They stated that the reversal

appeared to be based on a finding that the evidence, though technically sufficient, was so tenuous as to prompt an Appellate Court to exercise its discretion, and in the interest of justice grant a new trial.

However, that wording of the Florida Supreme Court, was considered by the United States Supreme Court in it's June 14, 1978, ruling on the Greene case, and they found, based on that wording, that the reversal had been because of insufficient evidence.

A review of the statements made by the Florida Supreme Court in this case wherein the Court stated that: "Tibbs' principal contention to this Court is that the totality of evidence at trial was insufficient to place him at or near the scene of the murder and rape at the time they occurred, or to establish his identity as the perpetrator beyond all reasonable doubt." *Tibbs* v. *State*, 337 So.2d 788, 789 (Fla. 1976), and their quote from another case that " 'Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt.' " *Id.* at 791, force this Court to believe, and so find, that the Florida Supreme Court reversed this case on the basis of insufficient evidence. If they had intended otherwise, they could have removed the above-mentioned language from their opinion, and given a different basis for their ruling.

Additionally, in remanding the instant case back to this Court from the Federal Court, prior to June 14, 1978, District Court Judge Krentzman, relying on the Greene case as it stood before certiorari was granted by the United States Supreme Court, said: "The Florida Supreme Court could properly remand petitioner for new trial despite its finding that there was insufficient evidence in the record of petitioner's first trial to sustain his conviction." *Tibbs* v. *State of Florida*, 432 F.Supp. 1045, 1047 (1977).

Therefore, after considering the motion of the Defendant, the arguments of counsel, the above-mentioned

principles of law as set forth by our United States Supreme Court, and being duly advised in the premises, it is thereupon

ORDERED AND ADJUDGED that the Defendant's motion to dismiss on the grounds of double jeopardy, be, and the same is hereby granted.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 27th day of July, 1978.

JACK R. SCHOONOVER
Circuit Judge

[Certificate of Service Omitted in Printing]

SUPREME COURT OF FLORIDA

No. 56,918

DELBERT LEE TIBBS, PETITIONER

vs.

STATE OF FLORIDA, RESPONDENT

[April 9, 1981]

PER CURIAM

This case brings us the responsibility to delineate the occasions for retrial and discharge, respectively, of criminal defendants whose convictions have been reversed by Florida appellate courts. It arises from the decision of the Second District Court of Appeal in *State* v. *Tibbs*. 370 So.2d 386 (Fla. 2d DCA 1979).

In *Tibbs* v. *State*, 337 So.2d 788 (Fla. 1976), we reversed the petitioner Delbert Tibbs' original conviction for rape and for first-degree murder, and we remanded for a new trial. On remand, the trial court granted Tibbs' motion to dismiss the indictment against him on the ground that retrial would violate the double jeopardy clause of the fifth amendment to the United States Constitution. The trial court based its dismissal on two intervening decisions of the United States Supreme Court—*Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S 19 (1978). *Burks* had held that the double jeopardy clause prohibits retrial where an appellate court reverses a conviction on the ground that

the evidence is insufficient, and *Greene* applied that newly-articulated constitutional principle to the states' judicial systems.

On appeal of the order directing Tibbs' discharge from prosecution, the Second District Court of Appeal reversed. After analyzing our opinion reversing Tibbs' convictions, the district court concluded that the principles enunciated in *Burks* and *Greene* would not bar Tibbs' retrial since our reversal was based on the weight, rather than the legal insufficiency, of the evidence. The district court based its decision on a long line of Florida cases ostensibly standing for the proposition that an appellate court can reverse a conviction when the evidence is technically sufficient but its weight so tenuous as to require a new trial in the interests of justice.

One day after the Second District's action, we decided *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979). As in the present case, McArthur's original conviction had been reversed and remanded for a new trial.[1] After analyzing the earlier opinion, we concluded that our reversal had been based on the insufficiency of the evidence, so that *Burks* and *Greene* operated to preclude McArthur's retrial. We expressly left open the double jeopardy implications of appellate reversals based on evidentiary weight, as opposed to sufficiency.[2]

Tibbs then filed a petition for rehearing in the district court alleging that *McArthur* should be applied in his case to bar further prosecution. The Second District denied rehearing, emphasizing once again its belief that Tibbs' reversal had been based on the weight of the evidence rather than its legal insufficiency.[3] After this denial, Tibbs brought his case to us for review.

---

[1] McArthur v. State, 351 So.2d 972 (Fla. 1977).

[2] McArthur v. Nourse, 369 So.2d 578, 581 n.11 (Fla. 1979).

[3] State v. Tibbs, 370 So.2d 386, 388-89 (Fla. 2d DCA 1979).

We are asked by Tibbs to rule that our reversal of his original convictions was based on evidentiary insufficiency, not evidentiary weight. Beyond simply examining the foundation for our prior opinion as we did in *McArthur*, we perceive the need to explain the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary insufficiency, and to determine whether that distinction, if one really exists, shall remain viable in Florida.

II

At the outset, we note that the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*. In that case the Supreme Court ruled that the double jeopardy clause of the fifth amendment precluded retrial because an appellate reversal for insufficient evidence is essentially an acquittal. If a trial court holds the evidence insufficient, a judgment of acquittal will be entered and the defendant cannot be retried.[4] It should make no difference, the Court reasoned, that the appellate court rather than the trial court determined the evidence to be insufficient. In either situation, the government has failed to prove its case.[5]

The Court was careful to distinguish reversals for procedural errors in a trial, where double jeopardy does not bar retrial. In such cases, a reversal does not indicate that the government's case has failed, but simply that the judicial process leading to conviction was defective in some critical way. Retrial is appropriate since "the

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[4] *See* Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904).

[5] The Court reasoned that to hold otherwise would create a "purely arbitrary distinction" between a defendant who received the benefit of a correct lower court decision and one who did not. Burks v. United States, 437 U.S. 1, 11 (1978).

accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." [6]

After *Burks*, the double jeopardy implications of two categories of appellate reversal—reversals for insufficient evidence and reversals for trial error—are relatively clear. The district court, however, distinguished *Burks* by placing Tibbs' reversal in a third category: appellate reversals where the evidence is technically sufficient but its weight is so tenuous or insubstantial that a new trial is ordered in the interests of justice. While this third category of appellate reversals is often identified in Florida cases, both this Court in *McArthur* [7] and the United States Supreme Court in *Greene* [8] declined to rule on its double jeopardy implications. Without any guidance from either of us, the district court endeavored as best it could to find a place for the weight-sufficiency distinction in Florida's jurisprudence. It is no reflection on that court that we now take a somewhat different view of the matter.

III

The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy. Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Black's Law Dictionary 1285 (5th ed. 1979). In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. *Burks* v. *United States*, 437 U.S. 1, 16 n.10

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[6] *Id.* at 15.

[7] McArthur v. Nourse, 369 So.2d 578, 581 n.11 (Fla. 1979).

[8] Greene v. Massey, 437 U.S. 19, 26 n.10 (1978).

(1978). Weight, at least in theory, is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." Black's Law Dictionary 1429 (5th ed. 1979). It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. *See In re Estate of Brackett*, 109 So.2d 375 (Fla. 2d DCA 1959).[9]

As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact.[10] Rather, the concern

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[9] At the trial level, the weight-sufficiency distinction is apparent in our Rules of Criminal Procedure. We noted in *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979) that:

> [a] critical distinction has existed at least since 1967, when rules 3.380 (formerly 3.660) and 3.600 of the Florida Rules of Criminal Procedure were adopted. Rule 3.380(a) provides that a motion for judgment of acquittal should be granted if, at the close of the evidence, "the court is of the opinion that the evidence is *insufficient* to warrant a conviction." In contrast, rule 3.600(a)(2) provides that a motion for new trial shall be granted if the jury verdict is "contrary to law or the *weight* of the evidence."

Id. at 580 (footnote omitted) (emphases added).

Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror. It follows that a finding by the trial judge that the verdict is against the weight of the evidence is not a finding that the evidence is legally insufficient. *See* Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), *cert. denied*, 439 U.S. 1135 (1979).

[10] *See, e.g.*, Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978) (weight and credibility solely within province of jury; appellate court's only function to determine sufficiency as a matter of law); Abbott v. State, 334 So.2d 642 (Fla. 3d DCA 1976), *cert. denied*, 431 U.S. 968 (1977) (conflicts in evidence and questions about witness' credibility will not justify reversal when evidence is legally sufficient to support conviction); Wetherington v. State, 263 So.2d 294 (Fla. 3d DCA 1972).

on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.[11] Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.[12]

IV

The district court in this case reviewed a number of Florida appellate decisions reversing convictions on the alleged basis of evidentiary weight. Although the court's analysis is plausible, we prefer to view these ambiguous decisions as reversals which were based on sufficiency; that is, as cases in which the state failed to prove the defendant's guilt beyond a reasonable doubt. *See Greene* v. *Massey*, 437 U.S. 19, 25 (1978).

The first decision cited by the district court was *Williams* v. *State*, 58 Fla. 138, 50 So. 749 (1909). In that case, the court stated: "After carefully weighing the evidence, we are irresistibly impelled to the conclusion that there was not sufficient evidence adduced to warrant the [guilty] verdict of the jury . . . ." 58 Fla. at 151-52, 50 So. at 754. Although this language is imprecise, a careful reading of the opinion seems to indicate that reversal was based on the state's failure to place the defendants at the scene of the crime or to prove that they fired the fatal shots.

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[11] Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Wooten v. State, 361 So.2d 167 (Fla. 3d DCA 1978); Dawson v. State, 338 So.2d 242 (Fla. 3d DCA 1976).

[12] One problem, of course, is whether an appellate court actually "reweighs" the evidence in reviewing a trial court's grant or denial of a motion for new trial based on the ground that the verdict is contrary to the weight of the evidence. *See* note 9 *supra*. Although Florida case law offers no clear answer, *see* Mancini v. State, 273 So.2d 371 (Fla. 1973), this case does not require us to address this problem, and we leave its resolution for another day.

McNeil v. *State*, 104 Fla. 360, 139 So. 791 (1932), and *Woodward* v. *State*, 113 Fla. 301, 151 So. 509 (1933), are similar to *Williams*. In *McNeil* this court reversed because "the evidence of identity of the accused as being the guilty party [was] not satisfactory to the appellate court. . . ." 104 Fla. at 361, 139 So. at 792. The state, it appears, had failed to introduce substantial competent evidence to support its assertion that the defendant was present at the scene of the robbery. Since every material element of the offense was not proven, the evidence was insufficient to support a conviction. *See Gaetano* v. *State*, 273 So.2d 84 (Fla. 4th DCA 1973); *Parnell* v. *State*, 218 So.2d 535 (Fla.3d DCA 1969).

In *Woodward* the court granted a new trial "in view of the uncertainties appearing in the evidence, and the strong doubt which the evidence raises as to the defendants' guilt. . . ." 113 Fla. at 302, 151 So. at 509. Again, a close reading of the case leads us to think that Woodward's guilt was not established beyond and to the exclusion of every reasonable doubt.

The district court also relied upon *Skiff* v. *State*, 107 Fla. 90, 144 So. 323 (1932), and *Fuller* v. *State*, 92 Fla. 873, 110 So. 528 (1926). In *Skiff*, the Court reversed a rape conviction because the requisite evidence of the victim's character was unconvincing, explaining that "[t]he previous chaste character of the alleged victim is a material fact to be proved [by the state]." 104 Fla. at 91, 144 So. at 323. Here again, the reversal seemed to be predicated on the state's failure to prove every element of the crime. Likewise in *Fuller*, the court framed the issue presented by the principal contention on writ of error as "the sufficiency of the evidence to establish the identity of the defendant as the perpetrator of this homicide." 92 Fla. at 874, 110 So. at 528. *See also Ming* v. *State*, 89 Fla. 280, 103 So. 618 (1925).

The district court also relied on *Lowe* v. *State*, 154 Fla. 730, 19 So.2d 106 (1944), where the court granted "a new trial because of the inconclusiveness of the testi-

mony offered to establish the essential facts necessary to constitute the crime. . . ." *Id.* at 737, 19 So.2d at 110. Like the other "weight" cases which the district court considered, it is probable that *Lowe* in fact dealt with the state's failure to prove a material fact, which goes to the sufficiency of the evidence.

Our hindsight analysis of the foregoing cases does not mean that all Florida appellate decisions can be reconciled, or that none explicitly relied on evidentiary weight as the sole basis for reversal. Two cases in 1970, *Sosa* v. *Maxwell*, 234 So.2d 690 (Fla. 2d DCA 1970), and *Smith* v. *State*, 239 So.2d 284 (Fla. 2d DCA 1970), recognized that evidentiary weight could serve as a basis for appellate reversal.

Sosa v. *Maxwell* was preceded by *Sosa* v. *State*, 215 So.2d 736 (Fla. 1968), where we had reversed the defendant's convictions and remanded for a new trial because "evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree. . . ." *Id.* at 737. In *Sosa* v. *Maxwell*, the district court denied a writ of prohibition to bar retrial and characterized our earlier reversal as going to the weight, not sufficiency, of the evidence. We later denied certiorari review without opinion. *Sosa* v. *Maxwell*, 240 So.2d 640 (Fla. 1970). Our denial of certiorari, of course, was not an adjudication on the merits although it made the district court's *Sosa* decision the "law of the case." [13] Our original opinion persuasively suggests, however, that the conviction actually was reversed because the state failed to carry its burden of proof—that is, the reversal was based on the insufficiency of the evidence. The district court, it now seems, simply interpreted our decision wrongly.

In *Smith* v. *State*, 239 So.2d 284 (Fla. 2d DCA 1970), the district court reversed a conviction for rape. Although there was some evidence to support each element of the

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[13] Greene v. Massey, 384 So.2d 24 (Fla. 1980).

offense, the court concluded that the record as a whole disclosed such a possibility of error that a new trial was required. The court stated: "[J]udges have historically granted new trials in the interest of justice where the record, though technically sufficient, raises so much doubt that the conviction cannot in conscience be upheld." *Id.* at 290 (footnote omitted). On appeal we unanimously reversed. *State* v. *Smith*, 249 So.2d 16 (Fla. 1971). Describing the district court's opinion as "novel," we held:

> A twelve-man jury evaluated the evidence, including the credibility of the witnesses, presented in this case and found respondent guilty of the offenses charged. On appeal, the District Court determined that the evidence supported the conviction and the trial was free of error. Once that determination was made, the duty of the District Court was to affirm the conviction.

Id. at 18. We believe this approach is the correct one, and we today reaffirm it as a guiding principle of appellate review.

V

As the above analysis indicates, the district court's third category of appellate reversals—where the evidence is technically sufficient but its weight is so tenuous or insubstantial as to require a new trial in the interests of justice—has a questionable historical foundation. The cases relied on by the district court, though confusing and ambiguous in language, can each be seen as involving reversals based on the insufficiency of the evidence. In any event, the formulation in *State* v. *Smith* suggests that this third category of appellate reversals, if ever valid in Florida, should now be eliminated from Florida law. Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial. Cases now pending on appeal in which a court has characterized the re-

versal as based on evidentiary weight should be reconsidered in light of our decision today, and under the doctrine of *Burks* and *Greene* any retrial of those cases may or may not be barred on the basis of former jeopardy.

Considerations of policy support, if not dictate, this result. Elimination of the third category of reversal accords Florida appellate courts their proper role in examining the sufficiency of the evidence, while leaving questions of weight for resolution only before the trier of fact. Eliminating reversals for evidentiary weight will avoid disparate appellate results, or alternatively our having to review appellate reversals based on evidentiary shortcomings to determine whether they were based on sufficiency or on weight. Finally, it will eliminate any temptation appellate tribunals might have to direct a retrial merely by styling reversals as based on "weight" when in fact there is a lack of component substantial evidence to support the verdict or judgment and the double jeopardy clause should operate to bar retrial.

VI

One further note is in order regarding the scope of our decision today. Many of the "weight" cases cited by the district court included a statement that a new trial was being ordered "in the interest of justice." By eliminating evidentiary weight as a ground for appellate reversals, we do not mean to imply that an appellate court cannot reverse a judgment or conviction "in the interest of justice." The latter has long been, and still remains, a viable and independent ground for appellate reversal. Rule 9.140(f) of the Florida Rules of Appellate Procedure (1977) provides the relevant standards:

> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether

> or not insufficiency of the evidence is an issue presented for review.

This rule, or one of its predecessors, has often been used by appellate courts to correct *fundamental* injustices, unrelated to evidentiary shortcomings, which occurred at trial.[14] Retrial in these circumstances is neither foreclosed, nor compelled, by double jeopardy principles. Each situation is unique.

With respect to the special mention of capital cases in the second sentence of the rule, we take that sentence to mean no more than that an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal—namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction. The consequence of that action would be to bar retrial under the double jeopardy clause.

VII

The application of these principles to our original *Tibbs* decision does not offer an easy solution to the issue Tibbs presents, for a careful analysis would seem to indicate, candidly, that the opinion was—like the district court's decision in *Smith*—one of those rare instances in which reversal was based on evidentiary weight.

Tibbs' conviction rested primarily on the uncorroborated testimony of the rape victim, Cynthia Nadeau. Although this testimony alone was legally sufficient to support Tibbs' conviction under Florida law, *Thomas* v. *State*, 167 So.2d 309 (Fla. 1964), we reversed his conviction due to a number of "infirmities in the evidence establish-

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[14] *See, e.g.*, Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977); *In re* Tierney, 328 So.2d 40 (Fla. 4th DCA 1976); Kohn v. State, 289 So.2d 48 (Fla. 3d DCA 1974); Cleveland v. State, 287 So.2d 347 (Fla. 3d DCA 1973). Other cases have granted new trials "in the interests of justice" without explicitly citing the rule. *See, e.g.*, Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978); Ferber v. State, 353 So.2d 1256 (Fla. 2d DCA 1978); McClain v. State, 353 So.2d 1215 (Fla. 3d DCA 1977).

ing Tibbs as the perpetrator" of the crime. Among these infirmities were several aspects of Nadeau's testimony which cast serious doubt on her believability. In effect, we reweighed the evidence supporting Tibbs' conviction and remanded for a new trial. Judged in light of today's decision, this action was clearly improper. Given the dilemma that error has created, we appear to have several alternatives.

First, we could simply apply the principles enunciated in today's decision, vacate our previous reversal, and affirm Tibbs' conviction. This alternative would prejudice Tibbs for our improper reweighing of the evidence, and for that reason it is not terribly attractive.

Second, we could discharge Tibbs on the ground that he is entitled to this relief from our earlier decision, since we there indicated our serious concern "that Tibbs had nothing to do with these crimes." *Tibbs* v. *State*, 337 So.2d 788, 791 (Fla. 1976). Only by stretching the point, however, could we possibly use an "insufficiency" analysis to characterize our previous reversal of Tibbs' convictions.

A more sensible, third alternative, we believe, is to face squarely the double jeopardy implications of a pre-*Burks*, appellate reversal based on evidentiary weight. We recognize, of course, that this alternative will merely resolve Tibbs' particular situation, and will have little precedential effect on Florida's law after today's decision. Nonetheless, the interests of justice seem to require that we choose between a retroactive and artificial characterization of our earlier decision (an action we expressly declined to undertake in *Greene* v. *Massey*, 384 So.2d 24 (Fla. 1980)), and a retroactive application of double jeopardy principles to an appellate reversal improperly entered.

Despite the broader focus which Justice Sunberg would have us adopt to resolve our dilemma, the fact remains that we cannot fairly conclude from our original opinion that Tibbs' convictions were reversed on the grounds of

evidentiary insufficiency. If they were not, then generalized double jeopardy concepts are of no value here, for the United States Supreme Court has now made relatively clear that *only* those appellate reversals tantamount to an acquittal for insufficient evidence prohibit retrial under *Burks*. *United States* v. *DiFrancesco*, 101 S.Ct. 426, 433-37 (U.S. 1980). Other appellate reversals, including those where sufficient evidence was adduced but a conviction was nonetheless vacated, apparently do not implicate double jeopardy principles.

For these reasons the decision of the Second District Court of Appeals in *State* v. *Tibbs*, 370 So.2d 386 (Fla. 2d DCA 1979), is affirmed.

It is so ordered.

ADKINS, OVERTON, ALDERMAN and MCDONALD, JJ., Concur.

SUNDBERG, C.J., Concurs in part and dissents in part with an opinion.

ENGLAND, J., Concurs in part and dissents in part with an opinion.

BOYD, J., Dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUNDBERG, C. J., concurring in part and dissenting in part.

I concur in parts I through V of the majority opinion, but to the remainder I must respectfully dissent. Although the majority concedes that it is difficult if not impossible to characterize and thereby categorize the prior decisions of this Court and the district courts of appeal as to whether a reversal was based on "weight" as opposed to "sufficiency," nevertheless, our prior decision in this cause is dissected to conclude that the reversal was, in fact, based upon the weight and not the sufficiency of the evidence. Two aspects of this trouble me.

First, not only would such an act by the Court in our first decision have been "novel" [1] since there is no legal justification for such a procedure, but it would also have been unlawful. Regardless of how incorrect the cocnlusion in our first decision may now be perceived, nonetheless, our only authority to reverse the conviction based on the evidence, as an appellate court, was due to its insufficiency. We have consistently recognized that appellate courts may not reweigh evidence. They may only assess its sufficiency. *See Herzog* v. *Herzog*, 346 So.2d 56 (Fla. 1977); *Shaw* v. *Shaw*, 334 So.2d 13 (Fla. 1976); *Westerman* v. *Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972). So now to characterize our former action as an erroneous reweighing of the evidence seems improvident at best.

Furthermore, I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed—yes or no, why or why not. The answer is ineluctably affirmative. The reason requires an examination of double jeopardy principles. Whether the first trial results in an acquittal, conviction or no verdict, a major purpose of protection against double jeopardy is

[1] State v. Smith, 249 So.2d 16, 17 (Fla. 1971).

to prevent the imposition of multiple trials upon the defendant. *See Price* v. *Georgia*, 398 U.S. 323, 331 (1970). Because of its superior resources, the state must not be allowed to reprosecute the defendant for the same offense until it achieves the desired conviction. *See United States* v. *Scott*, 437 U.S. 82, 87 (1978). The double jeopardy clause is aimed at checking prosecutorial discretion and at preventing abuse of criminal prosecution used as a means of government oppression. These purposes are well summarized in the oft-quoted passage from *Green* v. *United States*, 355 U.S. 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Central to the prohibition against double jeopardy is the barrier forbidding a "second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (footnote omitted). The state is not allowed a "second crack" at convicting a defendant when its first effort fell short of the mark because it somehow failed to present the proper evidence. *See Swisher* v. *Brady*, 438 U.S. 204, 216 (1978). This is the rationale underlying *Burks* which recognizes that an appellate reversal for lack of evidence is tantamount to an acquittal. This is because such a decision by an appellate court constitutes "a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15.

Burks takes great care to distinguish the double jeopardy implications of appellate reversals due to trial error and those due to evidentiary insufficiency. Reversal and retrial because of trial error does not contravene double jeopardy principles because such a reversal implies nothing about the guilt or innocence of the defendant, but rather "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." *Id.* at 15. The distinction, therefore, is between reversal for a procedural trial error and reversal for a substantive lack of evidence to support the verdict.

The distinction made in *Burks* parallels that made in *United States* v. *Scott*, 437 U.S. 82 (1978), decided in the same term as *Burks*. In *Scott*, the Supreme Court held that double jeopardy protection could not be invoked by a defendant who had obtained dismissal of two counts of narcotics charges because of prejudice due to pre-indictment delay by the prosecution. The dismissal had been granted pursuant to a legal defense, not pursuant to a factual defense. The Supreme Court thus developed a definition of acquittal as " 'the ruling of the judge, whatever its label, [which] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' *Martin Linen* [430 U.S. 564] . . . at 571." *Scott*, 437 U.S. at 97. Scott had obtained a dismissal because of a legal and not a factual deficiency in the government's case and was therefore not entitled to double jeopardy protection.

Our task, then, is to decide whether this Court's prior reversal of Tibbs' conviction [2] is more closely related to trial error or evidentiary insufficiency, and whether the reversal is based upon a legal defense or a factual de-

[2] Tibbs v. State, 337 So.2d 788 (Fla. 1976).

fense. The problem is complicated by the nefarious creation in Florida case law of a theoretical third reason for appellate reversal, *viz.*, lack of evidentiary weight. Though this Court has never specifically recognized this reason for appellate reversals, at least two district court of appeal opinions have attempted to establish this as a basis for reversal. In *Sosa* v. *Maxwell*, 234 So.2d 690 (Fla. 2d DCA), *cert. denied*, 240 So.2d 640 (Fla. 1970), *cert. denied*, 402 U.S. 951 (1971), the district court sought to characterize this Court's prior reversal of a murder conviction as being based on lack of evidentiary weight. The district court attempted to avoid the growing trend it recognized in other states, which would not allow retrial after reversal based on evidentiary insufficiency. *Id.* at 692. Inherent in *Sosa* is the notion that the distinction the district court sought to establish between sufficiency and weight of the evidence had some meaning in terms of the applicability of the double jeopardy clause. Although the present majority rightly rejects the district court's characterization in *Sosa*, it paradoxically seeks to imply that the distinction used there is possessed of some significant meaning in terms of double jeopardy protection. We explicitly rejected this in *State* v. *Smith*, 249 So.2d 16 (Fla. 1971), when the same district court again attempted to foist this ground for appellate reversal into Florida's case law.[3] The ma-

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[3] Some of the basis for the creation of this third type of reversal, evidentiary weight, is exemplified in State v. Smith, 239 So.2d 284 (Fla. 2d DCA 1970), the case which we quashed in 249 So.2d 16 (Fla. 1971). The district court pointed out that though Florida lacks a corroboration requirement for rape convictions, the *results* in Florida appellate courts do not differ from those states which do have such a requirement. *Id.* at 286. Since Florida courts could not create a corroboration requirement as Georgia courts had in Davis v. State, 120 Ga. 433, 48 S.E. 180 (1904), because of such precedent as Doyle v. State, 39 Fla. 155, 22 So. 272 (1897), they instead sought to create a separate category of appellate review based on evidentiary weight, implementing a de facto corroboration requirement. The Florida Legislature

jority properly recognizes the weak support for this distinction and relegates it to history as an anomaly. The rejection of this third category of appellate reversal is supported by our recent decision in *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979), which firmly rejected the state's proffer of this basis as a means of avoiding double jeopardy application when we had reversed a murder conviction because the circumstantial evidence failed to rebut a hypothesis of innocence.[4]

Both opinions in *McArthur* and the present majority note that the United States Supreme Court did not directly address the issue with which we are faced when it decided *Greene* v. *Massey*, 437 U.S. 19 (1978), which applied the principles of *Burks* to the states. Both opinions point to a footnote, 437 U.S. at 26 n.10, where the Supreme Court declined to express a view on our specific problem. This lack of expressed opinion is the only significance I can find underlying the sufficiency-weight distinction which the majority develops, at least when the distinction is made at the appellate level. Yet the Supreme Court's refusal to decide whether double jeopardy protections are implicated under such a characterization does not necessarily imply that the principles of *Burks* and *Greene* are ipso facto inapplicable to our case. The issue is merly undecided, not uncontrolled by these two cases.

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sought to stem this tide of judicial lawmaking by explicitly rejecting a corroboration requirement for a sexual battery conviction. § 794.022(1), Fla. Stat. (1979). A majority of states has rejected the corroboration requirement which had no basis in common law, though the district court in *Smith* assumed otherwise. *See* 15 Duq. L. Rev. 305, 313 (1977); 7 J. Wigmore, Evidence § 2061, at 451 (Chadbourn rev. 1978).

[4] Tibbs' conviction did not rest entirely upon circumstantial evidence, so the standard requiring evidence which is inconsistent with any reasonable hypothesis of innocence set out in Davis v. State, 90 So.2d 629 (Fla. 1956), and with which McArthur v. State, 351 So.2d 972 (Fla. 1977), was concerned, is not here applicable.

Having surmised that the sufficiency-weight distinction is useless in resolving the case before us, I return to the problem of aligning Tibbs' case on the side of either trial error or evidentiary insufficiency, or alternatively on the side of either a legal defense or a factual defense. There can be no doubt that our original reversal of Tibbs' conviction was due to this Court's perception that the state had failed to establish the identity of Tibbs as the perpetrator of the murder and rape. This surely belongs in the category of evidentiary insufficiency and not trial error. Likewise, under the *Scott* distinction, the basis of the reversal was one going to a factual element of the case, identity, and was not a technical legal problem such as a preindictment delay by the prosecution. We were not concerned that Tibbs did not receive a procedurally fair trial; we were concerned with the insufficiency of a factual showing of identification. Under either the *Burks* or *Scott* distinction, Tibbs' case is therefore one which deserves protection from double jeopardy.

Finally, I turn to the practical problems that the majority's decision presents. The majority implies that the evidence was legally sufficient[5] to convict Tibbs and that therefore a retrial would not violate the fifth amendment since the state would not be allowed a second attempt at mustering evidence it had failed to produce at the first trial. But we must carry the principle of sufficient evidence through the retrial stage, since it is the basis for avoiding *Burks* and *Greene*. We cannot logically allow the state in a second trial to supplement the evidence presented at the first trial, at least not without completely ignoring the themes of the double jeopardy clause here outlined. Since the same evidence must be used, an appellate court would have no choice but once again to reverse a conviction because of our

[5] This implication is inherent in the majority's position, since the only other stance would hold the evidence insufficient, and *Burks* and *Greene* would prevent retrial.

reversal under identical circumstances. This result would follow unless the majority's opinion were construed to reverse our reversal of Tibbs' conviction, in which case we should reinstate the original judgment to avoid double jeopardy problems. A second practical problem is created by the passage of seven years from the date of the crime. If the prosecutrix's identification of the defendant was suspect at the original trial, it is certainly unrealistic to presume on retrial that the passage of so many years will improve her perception.

Both of these problems lead to the conclusion that in spite of the appearance of allowing retrial, the majority has tacitly acquitted Tibbs. Rather than reach this result by tedious circumambulation, I would quash the decision of the District Court of Appeal, Second District, because retrial of the defendant violates the fifth amendment, recognizing that what we did in reversing Tibbs' conviction was to assess some form of factual deficiency in the evidence proving defendant's guilt.

ENGLAND, J., concurring in part and dissenting in part.

I concur fully with parts I through V of today's opinion. I dissent, however, from the Court's decision to allow a retrial for Tibbs. Rather than recycle Tibbs through the criminal justice system, I would direct his discharge in the interest of justice. Fla. R. App. P. 9.140(f).

BOYD, J., dissenting.

I dissent from the majority opinion allowing re-trial of Delbert Tibbs. It is my view that this result allows the State of Florida to again put petitioner in jeopardy of his life for crimes which the state has already attempted and failed to prove.

When petitioner originally appealed his conviction to this Court, I concurred in the judgment of the Court reversing and remanding for a new trial. *Tibbs* v. *State*,

337 So.2d 788, 792 (Fla. 1976) (Boyd, J., concurring specially). My concurring opinion reveals my view, which I still hold, that when an appellate court judges the sufficiency of evidence to support a criminal conviction, it does so upon the whole record, and will therefore not always be bound by such general rules of sufficiency as the one pertaining to the uncorroborated testimony of a rape victim, stated in *Thomas* v. *State*, 167 So.2d 309 (Fla. 1964). While such a rule of evidentiary sufficiency provides that the kind of evidence in question (e.g., uncorroborated identification of rape victim) may, as a matter of law, be sufficient, it does not preclude the appellate court from inquiring, upon the whole record, whether the verdict is supported by competent, substantial evidence. The inquiry is whether a jury of reasonable people could conceivably conclude from the evidence admitted that guilt was proved beyond a reasonable doubt. *See, e.g., Griffis* v. *Hill*, 230 So.2d 143 (Fla. 1970). On the original *Tibbs* appeal, I also expressed my reluctance, since the conviction in my view was being reversed because of the insufficiency of the evidence, to concur in the Court's mandate allowing a new trial.

In *McArthur* v. *State*, 351 So.2d 972 (Fla. 1977), where it was clearer that the ground of reversal was evidentiary insufficiency, I dissented from that portion of the Court's decision holding that a new trial was permissible. *Id.* at 978 (Boyd, J., concurring in part and dissenting in part). When this Court later denied Nadean McArthur's petition to prohibit her retrial, *McArthur* v. *Nourse*, 358 So.2d 132 (Fla. 1978) (prohibition denied without opinion), the United States Supreme Court granted certiorari, vacated the order, and remanded for reconsideration in light of *Greene* v. *Massey*, 437 U.S. 19 (1978) and *Burks* v. *United States*, 437 U.S. 1 (1978). When this Court reconsidered the case, it concluded that the Double Jeopardy Clause would

not allow another trial. *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979).

Greene and *Burks* now make clear that when an appellate court finds that a judgment cannot stand because the state has failed to carry its burden of proof, it is a violation of the Fifth and Fourteenth Amendments to allow the state to have another chance. I disagree, moreover, with the majority opinion's statement that "the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*." The reason that courts, in many of the cases cited by the majority, were so careful to characterize their decisions as reversals for lack of weight rather than legal insufficiency, was because of an understanding that Double Jeopardy disallowed retrial after reversal for insufficiency. *See, e.g., Sapir* v. *United States*, 348 U.S. 373 (1955); *Smith* v. *State*, 239 So.2d 284 (Fla. 2d DCA 1970).

The Double Jeopardy Clause was written to prevent precisely what the Court's decision today allows—successive attempts by the state to prove its accusations. This Court's holding that the state failed to carry its burden in petitioner's trial, and that the conviction therefore could not stand, should now be seen as the equivalent of a judgment of acquittal, and be afforded the same finality as a jury verdict to that effect. Petitioner should be forever discharged from the accusations made against him.

Under my reading of the opinion of the Court, if the same evidence is presented against Tibbs on re-trial as was adduced at his first trial, he is found guilty, and he challenges the sufficiency of the evidence, the court having jurisdiction of the appeal will be obliged to hold the evidence sufficient to support a conviction. Yet when the previous judgment was before this Court on appeal, it was held that the same evidence was not enough to

support the conviction. This flies in the face of principles of *res judicata* and, I repeat, violates the Double Jeopardy Clause. The Court is saying that we made a mistake when we reversed the original conviction, that we erred in our evaluation of the question of evidentiary sufficiency. I do not agree that we erred; even if we did, however, it is too late now to correct the error. In my view, the only error was in allowing a new trial.

SUPREME COURT OF FLORIDA

No. 47258

DELBERT TIBBS, a/k/a DELBERT JOHNSON, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

July 28, 1976

Rehearing Denied Sept. 28, 1976

George C. Howard, of Howard & Mann, Chicago, Ill., for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

ENGLAND, Justice.

This cause is before us on direct appeal to review the convictions of Delbert Tibbs for rape and murder in the first degree. Tibbs was sentenced to life imprisonment and to death, respectively. We have jurisdiction under Article V, Section 3(b)(1) of the Florida Constitution, and Section 921.141, Florida Statutes (1975).

Tibbs was charged in a three count indictment with the rape of Cynthia Nadeau, the premeditated murder of Terry R. Milroy, and the crime of felony murder for killing Milroy while raping Nadeau. A jury trial was held which resulted in conviction for rape and first degree murder. A death sentence was recommended by the jury for murder, and the trial judge imposed the death penalty for that crime.

The relevant facts of the alleged crime, as brought out on trial, were these. Nadeau and Milroy were hitch-

hiking to Marathon from St. Petersburg, when they were picked up in Fort Myers by a man alleged to be driving a green truck with a rounded hood, black vinyl seats, no door handle, and an oil light that blinked on and off. This man drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where the driver was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay. Milroy pleaded with the driver not to kill him, but the man shot him again, inflicting the fatal wound. The driver then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered to get out and walk in front of the truck. She left the truck, but was able to run and successfully escape.

Tibbs' principal contention to this Court is that the totality of evidence at trial was insufficient to place him at or near the scene of the murder and rape at the time they occurred, or to establish his identity as the perpetrator beyond all reasonable doubt. Specifically he states that there is no evidence to corroborate the testimony of Cynthia Nadeau, the 17-year old rape victim, and that her testimony is so riddled with conflicts and is so inherently unreliable that his conviction and attendant death sentence should be reversed. Tibbs also contends, and we agree after reading the transcript, that no credence can be given to the testimony of Tibbs' Lee County jailmate, serving a life sentence for rape, to the effect that Tibbs confessed to the crime. This testimony appears to be the product of purely selfish considerations.

Under Section 921.141(4), Florida Statutes (1975), and Fla.App. Rule 6.16(b), it is our obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a

new trial. Our review of the record of this proceeding leaves us with considerable doubt that Delbert Tibbs is the man who committed the crimes for which he has been convicted. Since the principal testimonial evidence against Tibbs came from Nadeau, we begin with the legal rules governing its reliability.

The law in Florida appears well established to the effect that no corroborative evidence is required in a rape case when the victim can testify directly to the crime and identify her assailant. *Thomas* v. *State*, 167 So.2d 309 (Fla. 1964). Obviously this rule also applies to the rape-murder crimes with which Tibbs was charged. The policy reasons for this rule are sufficiently apparent that they need not be reiterated or re-examined here. The limitation to its application, however, is "that where the sole witness is the prosecutrix, her testimony must be carefully scrutinized so as to avoid an unmerited conviction." *Thomas*, above, at 310.

In this case, we find the following infirmities in the evidence establishing Tibbs as the perpetrator of these crimes:

(1) Except for the testimony of Nadeau, not one shred of evidence was developed to place Tibbs in the Ft. Myers area at any time, let alone on or near February 3, 1974, the date of the crimes. Admittedly Tibbs was not a public or social figure who would have made acquaintances or attracted attention, but with the publicity attending the crimes and the discovery methods available to the state, surely someone might have been found who could (at least tentatively) have identified Tibbs as having come to Ft. Myers, eaten in Ft. Myers, passed through Ft. Myers, or at least been seen walking or riding in Ft. Myers. No such person was brought forward, and only Cynthia Nadeau's testimony puts this man in that area of Florida. In contrast, undisputed evidence established Tibbs' presence in Daytona Beach on the night of February 1 and the morning of February 2, in Leesburg on February 6, and in Ocala on

February 7. Except Nadeau's testimony, there is no evidence to place Tibbs in the southwest corner of the state during this five day interval.[1]

(2) No trace was ever found of the truck which Nadeau stated was driven by Tibbs when she and Milroy were picked up in Ft. Myers and taken to the scene of the crimes. Despite her specific testimony as to the color of the truck, its type and its special characteristics (no right door handle, rounded hood, blinking oil light), and the additional fact that her description was given to the police within an hour of Milroy's death and her alleged rape, the police were unable to locate any vehicle like the one she described despite an exhaustive car and helicopter search of the area. This fact can be evaluated against the uncontroverted evidence that Tibbs was on the other side of Florida, in Daytona Beach, the morning of the day before the crimes and at that time possessed no vehicle for his use.

(3) No gun or car keys were ever found in Tibbs' possession, at the scene of the crime, or elsewhere. When Tibbs was stopped by police officers in Florida and Mississippi (February 6 in Leesburg, February 7 in Ocala, and March 13 in Clarksdale, Mississippi) he was afoot, and there was no evidence that he had either owned or operated a motor vehicle.

(4) On the three occasions when Tibbs was stopped by police on the basis of the description issued by Nadeau, he cooperated fully with the officers by providing all information and identification they requested, by allowing himself to be photographed, and on the last oc-

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[1] The state introduced records from the Orlando Salvation Army which would have placed Tibbs in that area on the night of February 4. Without passing on Tibbs' assertion that the signature on the card was not his (which a superficial comparison with his admitted signature on a like record from the Daytona Beach Salvation Army seems to bear out), Orlando is still the nearest place to Ft. Myers, geographically and in time, that the state was able to place him, except of course for Nadeau's testimony.

casion by waiving extradition in Mississippi to voluntarily return to Florida to face rape and murder charges in Ft. Myers.

(5) No evidence was introduced which casts doubt on Tibbs' veracity. He did not have a previous criminal record and he had never been arrested, except possibly for a traffic violation. Evidence was introduced from people in his home town, including a minister and elected state officials, that he was a law-abiding citizen.

(6) Several features of Nadeau's testimony, when considered with other evidence in the record independently established and uncontroverted, cast doubt on her believability. For one, despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs' features and characteristics into her mind, all independent evidence of the events indicates that the crimes occurred after nightfall. For another, her admitted use of marijuana throughout the day and immediately prior to the crimes cast doubt on her identification of Tibbs. Thirdly, the manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than would have been possible with multiple photographs of more than one person.

We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legislature has directed that we review the "entire record". Our obligation now is no less than it was when Odie McNeil was sentenced to life imprisonment in 1932 and this Court said:

> "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt. This is especially true in a case where life imprisonment is the penalty

imposed. *Heath* v. *State*, [97 Fla. 330, 120 So. 846] supra. And where the evidence of identity of the accused as being the guilty party is not satisfactory to the appellate court, a new trial will be granted. *Nims* v. *State*, [70 Fla. 530, 70 So. 565] *supra*.

In this case the sole testimony identifying the defendant McNeil as a participant in the robbery was given by the witness Rahming . . ..

While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also the rule that the evidence relied on to have this effect must be substantial in character.

When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an accused as a participant in a crime of which he has been found guilty." *McNeil* v. *State*, 104 Fla. 360, 139 So. 791, 792 (1932).

Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial.

SUNDBERG and HATCHETT, JJ., concur.

BOYD, J., concurs specially with an opinion.

ROBERTS, J., dissents with an opinion.

OVERTON, C. J., and ADKINS, J., dissent and concur with ROBERTS, J.

BOYD, Justice (concurring specially).

I concur in the majority opinion by Justice England vacating the conviction and sentence and requiring a new trial. I base this conclusion upon the weakness and

inadequacy of the testimony against appellant given in the trial court.

In each instance before the death penalty may be imposed under Florida law this Court, far from the scenes of the crimes and pressures of the trial court proceedings, and with clinical objectivity, evaluates the record. We must determine whether such convicted persons are to be executed, imprisoned or set free.

Under Anglo-American standards of criminal justice the record in this case does not, in my judgment, support the imposition of either capital punishment or imprisonment.

In the case of *Griffis* v. *Hill*, 230 So.2d 143 (Fla. 1969) this Court held that:

> "The test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict."

The major corroborating witness for the State is a convicted rapist who admitted under oath in this trial proceeding that he had testified falsely under oath in connection with his prior trial relating to his guilt and his ability to pay legal counsel. The witness testified that he was angered because a state investigator had accused him of being a liar and at first refused to consider the testimony which he wanted to give against appellant to the effect that appellant had made an admission of guilt to him while they were in jail together. It should have been obvious that the witness was attempting by his testimony to benefit himself in connection with his own imprisonment. The eyewitness testimony of the rape victim is the only testimony having any merit whatever, but it is not supported by even the slightest additional testimony placing appellant within 150 miles of the scene of the crime when it occurred. The mysterious truck in which the rape victim testified she and her attacker had smoked marijuana cigarettes could never be found, although the other convicted rapist claimed that

appellant had told him the truck had been abandoned when it ran out of gas between Ft. Myers and Miami. The testimony further shows that on the fateful day of the crimes, the rape victim had smoked marijuana cigarettes on several occasions during the day and was under the influence of marijuana at the time the crimes were committed. Immediately after the crime she resumed her status as the "common law wife" of the man whom she had deserted in St. Petersburg when she eloped with the murder victim. Although she personally identified appellant from pictures, in a lineup and at trial, the testimony given by the rape victim immediately after the crime gave a description of a ruffian whose language, personality and physical appearance conflicted substantially with that of the appellant who was identified at the trial by Chicago public officials and professional people as having a good reputation and being a law abiding citizen.

Although the weakness of the evidence presented in the trial court might well require that the appellant be released from incarceration without further litigation, it is my understanding that Florida law permits a new trial and I, therefore, reluctantly concur in the majority opinion providing for such new trial.

ROBERTS, Justice (dissenting).

I must respectfully dissent.

Appellant was charged in a three count indictment with rape in that he did unlawfully and feloniously ravish and carnally know a female of more than ten years of age, to-wit: Cynthia Nadeau, by force and against her will; with murder in the first degree in that he did unlawfully, feloniously and from a premeditated design to effect the death of Terry R. Milroy, did shoot Milroy with a deadly weapon—a pistol thereby inflicting a mortal wound from which Milroy died; and with felony murder in that he did unlawfully and feloniously kill Milroy while perpetrating the rape of Cynthia Nadeau. The jury returned a verdict of guilty of rape, and guilty

of murder in the first degree and recommended the death penalty. The trial court adjudicated him guilty of murder in the first degree and rape and sentenced him to consecutive sentences of death and life.

Hitchhiking to Marathon, Florida, from St. Petersburg, Cynthia Nadeau and Terry Milroy were picked up in Fort Myers by a man, identified as the defendant, driving a green truck with a rounded hood, black leather vinyl seats, no door handle, with the oil light going on and off. Defendant drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where defendant was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay, Milroy pleaded with defendant not to kill him, but defendant shot him again inflicting the mortal wound which caused Milroy's death. Defendant then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered by defendant to get out and walk in front of the truck. She did exit the truck but ran and successfully escaped.

Appellant has raised several points on appeal relating to the identification procedure employed by the State, the jury venire, testimony of the prosecutorial identifying witness, introduction into evidence of the polygraph test contained in the police report, alleged forgery of registration card at the Salvation Army Center in Orlando, alleged perjured testimony of the corroborating witness Tibbs, brief period of time in which jury deliberated before returning its verdict of guilty as charged, and the constitutionality of the death penalty.

Subsequent to the rape and murder, Nadeau gave a detailed description of her assailant. Because he fit the description, the defendant was stopped several times for questioning. Appellant explains that the complaining wit-

ness, having previously been unable to identify her assailant from photograph identification albums provided by the police, was presented with two photographs of the defendant whom she identified as her assailant. She later identified him in a four-man lineup and again at trial. Appellant argues that the photographic identification by Cynthia Nadeau who identified appellant as her assailant and the murderer of Milroy so tained the subsequent lineup and trial identifications as to deprive him of due process of law because this procedure was so suggestive as to give rise to a real likelihood of irreparable misidentification.

The prosecutrix in *Chaney* v. *State*, 267 So.2d 65 (Fla. 1972), identified her assailant when presented with a single photograph of him by the Sheriff's deputy. Subsequently, she identified him from a lineup. Taking into consideration the circumstances surrounding the identification and the guidlines set out by the Supreme Court of the United States to ensure against misidentification, this Court held that the identification procedures employed were not so fatally tainted to deprive appellant of due process of law. Therein, this Court explained:

> "Within the latitude of the particular facts of this case and taking them all into consideration, as we may do under the guidelines of the Supreme Court of the United States, it does not appear to us that the identification procedures employed herein were fatally tainted to the point of depriving Appellant of due process of law.
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> "It is true that a single photograph of Appellant was shown prosecutrix by the sheriff's deputy, because she told him Appellant had revealed to her he had been jailed for raping another girl. Pursuant to this revelation, it is logical that the police would show prosecutrix a photograph of a suspect in another rape case who had been jailed as a lead in identifying and arresting the person suspected of committing the crime of rape upon the prosecutrix.

Under these circumstances, it was not an abuse of due process rights to use the single photograph as a clue or lead in apprehending the rapist of prosecutrix. In fact, it would be unreasonable to preclude the use of such a photograph for this pre-arrest purpose.

"*Moreover, the fact that prosecutrix had opportunity to see her assailant over a period of several hours, including daylight of the day succeeding his original attack upon her, is such an overwhelming circumstance of independent origin as to discount the suggestion that only through means of the photograph prosecutrix was able to identify Appellant.* Corroborating latent fingerprints extracted from furnishings and items in the trailer where the rape occurred were identified as belonging to Appellant.

"We conclude that the totality of the particular circumstances of this case does not disclose that prosecutrix's identification of Appellant was fatally tainted to the point of denial of his rights of due process." (Emphasis supplied)

In *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), which involved a victim's identification of the defendant at a stationhouse showup which occurred several months after the rape, the Supreme Court determined that, although the stationhouse identification may have been suggestive, under the totality of circumstances, the victim's identification was reliable and was properly allowed to go to the jury. First discussing the past precedent relative to the scope of due protection against the admission of evidence deriving from misidentification procedures,[1] the Supreme Court

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[1] "In *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the Court held that the defendant could claim that 'the confrontation conducted . . . was so unnecessarily suggestive and conducive of irreparable mistaken identification that he was denied due process of law.' Id., at 301, 302, 87 S.Ct., at 1972. This, we held, must be determined 'on the totality of the circumstances.'

delineated guidelines to be considered relative to the relationship between suggestiveness and misidentification, as follows:

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of ir-

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We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hopsital room, and also made an in-court identification.

"Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

> " '[W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons* v. *United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

"Again we found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

* * * *

"In the most recent case of *Coleman* v. *Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), we held admissible an in-court identification by a witness who had a fleeting but 'real good look' at his assailant in the headlights of a passing car. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. Mr. Justice Brennan for four members of the Court stated that this evidence could support a finding that the in-court identification was 'entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup.' 399 U.S. at 5-6, 90 S.Ct., at 2001."

reparable misidentification.' *Simmons* v. *United States*, 390 U.S., at 384, 88 S.Ct., at 971. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. [*Foster* v. *California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402.] Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased change of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.

"What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. *Clemons* v. *United States*, 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (Leventhal, J., concurring); cf. *Gilbert* v. *California*, 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178 (1963); *Mapp* v. *Ohio*,

367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall* v. *Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

"We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Upon consideration of these guidelines, the Supreme Court concluded:

"We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had 'no doubt' that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity

of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face 'I don't think I could ever forget.' App. 127.

"There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inhered in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury."

Applying the factors described in *Neil* v. *Biggers*, supra, appellate states that Nadeau's identification was reliable and was properly submitted to the jury. I agree.

Although appellant originally objected to the jury venire at the commencement of trial proceedings, he subsequently expressly withdrew the objection to the venire after the jury was selected. The following is reflected by the record:

"THE COURT: Mr. Howard, for the record, are you withdrawing your objection that you made yesterday?

"MR. HOWARD: Yes.

"MR. LONG: For the record, Mr. Howard, you are withdrawing the objection to the venire as it appeared in the courtroom as of yesterday?

"MR. HOWARD: Yes.

"MR. LONG: Thank you very much, Mr. Howard.

"THE COURT: Is the State ready to proceed?

"MR. LONG: Yes.

"THE COURT: Defense ready to proceed?
"MR. HOWARD: Yes."

Accordingly, appellant can not now complain of reversible error on this ground, in *State* v. *Silva*, 259 So.2d 153 (Fla. 1972), this Court held:

> "Such an objection comes too late after verdict and has no place in a motion for new trial or in arrest of judgment. By going to trial before a jury without any objections, a defendant waives all irregularity in the drawing, summoning and impaneling of such jurors. *Green* v. *State*, 60 Fla. 22, 53 So. 610 (1910); *Lake* v. *State*, 100 Fla. 386, 129 So. 833 (1930); 14 F.L.P., Jury, § 111; 20 Fla.Jur., Juries, § 68."

Appellant contends that the introduction into evidence of the police report which included results of a polygraph test given to Miss Nadeau and other hearsay evidence was error. The defense used the police report extensively in cross-examination of a witness. Thereafter the State moved to introduce the report into evidence. The trial judge then specifically inquired of defense counsel whether there was any objection to the introduction of the report to which defense counsel responded that he had no objection. The following appears in the record:

> "MR. LONG: Your Honor, at this time I would move to introduce the investigator's report into evidence that Mr. Wallace has been testifying from.
> "MR. HOWARD: Well, excuse me. Judge, I don't want to argue the matter. May we approach the bench?
> "THE COURT: You have seen it. Do you have any objection? If you have an objection then we will return the jury back to the jury room. That's what we usually do. Do you have any objection to it being introduced?
> "MR. HOWARD: *No, sir. That is all right.*
> "MR. LONG: Thank you.

> "THE COURT: All right. Mr. Clerk, please mark the investigator's report into evidence carrying the same number." (Emphasis supplied)

The report was thereby stipulated into evidence. I find no reversible error as to this point. Cf. *Codie* v. *State*, 313 So.2d 754 (Fla.1975); *Woods* v. *State*, 285 So.2d 650 (Fla.App. 3, 1973).

I have carefully considered the several other points on appeal presented by appellant and find none to be meritorious so as to constitute reversible error.

I have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and I have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that I find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded. Cf. *State* v. *Dixon*, 283 So.2d 1 (Fla.1973); *Alford* v. *State*, 307 So.2d 433 (Fla.1974).

The jury recommended and the trial judge, upon considering all the mitigating and aggravating circumstances, agreed that the death penalty be imposed for the commission of this atrocious and heinous crime. I find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause.

I, therefore, respectfully dissent.

OVERTON, C. J., and ADKINS, J., concur.

DISTRICT COURT OF APPEALS OF FLORIDA
SECOND DISTRICT

No. 78-1598

STATE OF FLORIDA, APPELLANT

v.

DELBERT LEE TIBBS, APPELLEE

March 28, 1979

Rehearing Denied April 25, 1979

Jim Smith, Atty. Gen., Tallahassee, and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellant.

Louis R. Beller, Miami Beach, and Jerry Paul, Durham, N.C., for appellee.

BOARDMAN, Judge.

Appellee Tibbs' original conviction for rape and first-degree murder was reversed for a new trial by the Supreme Court of Florida. *Tibbs* v. *State*, 337 So.2d 788 (Fla. 1976). On remand the trial court concluded that to retry Tibbs would violate the double jeopardy clause of the fifth amendment to the United States Constitution and, therefore, granted his motion to dismiss the indictment against him. This appeal followed timely. We reverse.

The applicable law at the time the supreme court's decision was rendered was that where a defendant successfully sought reversal of a conviction, there was no double jeopardy upon a new trial. *See Forman* v. *United States*, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960); *Bryan* v. *United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950). However, in June of last year, the United States Supreme Court held in two separate cases that where an appellate court reverses a conviction solely

on the ground of insufficiency of the evidence, the double jeopardy clause prohibits retrial. *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). That rule was applied to the states in *Greene* v. *Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), a case arising from a Florida prosecution.

However, because of the varying interpretation that could be placed on the Florida Supreme Court's opinion reversing Greene's conviction, reported as *Sosa* v. *State*, 215 So.2d 736 (Fla.1968), the United States Supreme Court did not discharge defendant Greene, but remanded the case to the United States Circuit Court of Appeals for reconsideration in light of its opinions rendered in *Greene* and *Burks*. At this writing *Greene* is still pending before the Fifth Circuit.

The sole point on this appeal is whether the principles enuniciated in *Greene* and *Burks* bar reprosecution of appellee on the ground of double jeopardy. Based upon careful review of the complete record, including the briefs filed by the attorneys for the parties, we answer the point in the negative.

Our supreme court has reversed a number of convictions where it found the weight of the evidence to be insubstantial, although not technically insufficient. For instance, in the case of *Williams* v. *State*, 58 Fla. 138, 50 So. 749 (1909), the Supreme Court of Florida weighed the evidence against the three defendants and concluded that the evidence strongly indicated that the jury must have been influenced by considerations outside the evidence as to two of the defendants. Significantly, the court went on to hold that while the evidence appeared to support the verdict as to the third defendant, reversal of the codefendants' convictions required a new trial for the third defendant as well to meet the "ends of justice."

In *McNeil* v. *State*, 104 Fla. 360, 139 So. 791 (1932), the court pointed to the serious nature of the penalty (life imprisonment) and ordered a new trial where although there was direct evidence identifying the defendant as the perpetrator of the crime, this evidence was

"not satisfactory to the appellate court." 139 So. at 792. In *Woodward* v. *State*, 113 Fla. 301, 151 So. 509 (1933), the court, pointing to the weakness of the evidence, reversed the conviction and remanded for a new trial by another jury in order to serve the "ends of justice."

In *Skiff* v. *State*, 107 Fla. 90, 144 So. 323 (1932), the supreme court found that the evidence as to the previous chaste character of the victim was unconvincing and held that justice demanded a new trial. In *Fuller* v. *State*, 92 Fla. 873, 110 So. 528 (1926) the supreme court awarded a new trial on the ground that while there was some evidence pointing to the defendant as the guilty party, the evidence of identity taken as a whole was such that it was "considered just and right that another jury should pass upon the issues made." *See also Nims* v. *State*, 70 Fla. 530, 70 So. 565 (1915).

Perhaps the most succinct statement of this standard of review is: "Where the evidence is sufficient to sustain the verdict a new trial should not be granted unless it is clear that injustice will result if not granted." *State* v. *Coles*, 91 So.2d 200 at 202 (Fla.1956). This standard of review was recognized by this court in *Sosa* v. *Maxwell*, 234 So.2d 690 (Fla.2d DCA 1970), *cert. denied*, 240 So.2d 640 (Fla.1970), *cert. denied*, 402 U.S. 951, 91 S.Ct. 1635, 29 L.Ed.2d 121 (1971). After the Supreme Court reversed the convictions of Greene and Sosa and remanded for new trial, the defendants filed in this court a suggestion for writ of prohibition seeking to prohibit a retrial for murder in the first degree. In denying relief the court stated:

> Indeed, it would constitute an anomaly in law if an appellate court could not reverse and remand for a new trial if it was of the opinion that the evidence, while legally sufficient to support the jury's verdict, was so far from convincing as to require a new trial in the interest of justice.

Id. at 692.

In *Lowe* v. *State*, 154 Fla. 730, 737, 19 So.2d 106, 110 (1944), where the only evidence of the defendant's guilt of the rape charge came from the victim's testimony, in reversing and remanding for a new trial, our supreme court stated:

> We have held in many cases if, after a full and careful consideration of the entire record, the ends of justice will be best subserved in granting a new trial because of the inconclusiveness of the testimony offered to establish the essential facts necessary to constitute the crime, then, and under these conditions and circumstances, it becomes the duty of this Court to reverse the cause for a new trial.

In the instant case, where the only testimony against Tibbs was that of a former cellmate, who testified that Tibbs had admitted the charged crimes, and that of the rape victim who testified that Tibbs was her assailant, the Florida Supreme Court examined the credibility of the witnesses in light of the remaining evidence and concluded: "Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial." 337 So.2d at 791.

We are aware of Justice Boyd's specially concurring opinion in *Tibbs* in which is stated: "I base this conclusion [vacating the conviction and sentence and requiring a new trial] upon the weakness and inadequacy of the testimony against appellant given in the trial court." 337 So.2d at 792. This statement notwithstanding, we believe that the other members of the court who joined in the majority opinion reviewed the entire record, as they are mandated to do by statute,[1] and undertook to

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[1] "Under Section 921.141(14), Florida Statutes (1975), and Fla. App. Rule 6.16(b), it is our obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a new trial." *Tibbs* v. *State*, 337 So.2d 788, 790 (Fla. 1976).

determine whether the testimony of the victim of the rape and Tibbs' cellmate was believable and substantial in character. The majority concluded that their testimony was not believable and not substantial in character. In our judgment the court was considering the weight of this testimony and not its technical sufficiency. The concluding language of the opinion set out previously tends to indicate to us that the reversal was ordered "in the interests of justice" rather than on the basis that the evidence was totally and completely insufficient to support Tibbs' conviction of first-degree murder and rape. Had the court intended to predicate its ruling on the ground of the insufficiency of the evidence it could have and we think it would have so stated. Former Chief Justice Roberts writing the dissenting opinion which was concurred in by two other justices of the *Tibbs*' court stated that "no reversible error is made to appear and the evidence in *the record before us does not reveal that the ends of justice require that a new trial be awarded.*" (Emphasis supplied). 337 So.2d 796-97.

We hold that Tibbs may be retried for the offenses for which he was convicted and that the double jeopardy clause of the fifth amendment would not in this case bar a second prosecution. The reversal of his conviction was not on the basis of pure insufficiency of the evidence but rather was bottomed upon the majority's view that the evidence was inherently weak and seriously contradicted, and that Tibbs should be accorded the opportunity to be tried before another jury in the interest or ends of justice. Therefore, we do not believe that the decisions of the United States Supreme Court rendered in *Greene* v. *Massey* and *Burks* v. *United States* require that this court affirm the ruling of the trial court granting Tibbs' motion to dismiss the indictment. Accordingly, we reverse the trial court's order granting Tibbs' motion to dismiss, and we remand for further proceedings.

REVERSED and REMANDED.

GRIMES, C. J., and RYDER, J., concur.

ON PETITION FOR REHEARING

BOARDMAN, Judge.

We have reconsidered this case in light of the recent Supreme Court of Florida case *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979). In *McArthur* the court held that where the evidence is legally insufficient to support a guilty verdict, retrial of the defendant is prohibited by the fifth amendment.

McArthur is not on point. In that case the conviction was clearly reversed for insufficiency of evidence. In the case before us the rationale for reversal of the conviction was weight of the evidence. The supreme court stated in *McArthur* that "[w]e specifically decline to rule upon the double jeopardy implications of appellate reversals based upon considerations of evidentiary weight." *McArthur, supra*, at 581, n.11.

Petition for rehearing DENIED.

GRIMES, C. J. and RYDER, J., concur.

EXCERPTS OF THE TRIAL TESTIMONY OF THE SURVIVING VICTIM, CYNTHIA NADEAU, PAGES 496 THROUGH 521 AND PAGES 602-604 OF THE RECORD BEFORE THE FLORIDA SUPREME COURT IN *TIBBS* v. *STATE OF FLORIDA*, CASE NUMBER 74-254 CF

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[496] THIRD DAY OF TRIAL: December 13, 1974, 9:30 A.M.

THE COURT: Is the State ready to proceed?

MR. LONG: Your Honor, the State is ready to proceed.

THE COURT: Mr. Howard?

MR. HOWARD: Defense is ready.

THE COURT: Bring in the Jury, please.

(Jury returned to the Courtroom; following proceedings had in the presence of the Jury.)

THE COURT: Mr. Long, call your next witness.

MR. LONG: Your Honor, at this time the State of Florida calls Cynthia Ann Nadeau.

[497] Thereupon,

CYNTHIA ANN NADEAU,

a witness, produced for and in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LONG:

Q Would you please state your name for the record.
A Cindy Nadeau.
Q Where do you live, Miss Nadeau?
A Rhode Island; 54 Tingley, Pawtucket, Rhode Island.

Q How old are you, Miss Nadeau?

A Seventeen.

Q Cindy, I'd like to direct your attention to February 3rd, 1974. Do you recall that day?

A Yes.

Q Let's go back to—starting on February 3rd, 1974, where were you at during the morning of that day?

A St. Petersburg, I believe.

Q Where were you going, if anywhere, from St. Petersburg?

A To the Keys.

Q More specifically, where were you going?

[498] A Marathon.

Q Who were you with?

A Terry Robert Milroy.

Q Who is Terry Robert Milroy?

A A close friend of mine—close friend that was mine.

Q What did you do with Mr. Milroy?

A Please?

Q What did you do with Mr. Milroy the morning of September 3rd—excuse me, February 3rd, 1974?

A We were hitchhiking to the Keys—to Marathon—to the Keys.

Q All right. Where was the first ride that you obtained when you were hitchhiking from St. Petersburg to the Keys?

A Could you please repeat that.

Q Where was the first ride in your journey from St. Petersburg to the Keys?

A I can't recall the first ride. It was either in—it must have been in St. Petersburg. I don't recall the first ride. The first ride in my mind—I don't know if it was the first ride.

The first people I can recall picking me up was two friends of mine, Peggy and Al; they were married. They took us across Skyway Bridge.

[499] Q Sunshine Skyway Bridge?

A Yes. They were going to the beach; that was out of their way. They wanted to take us further and I told

them no. I said, "Go to the beach, enjoy yourselves, that was fine."

Q Did you make it to Venice, Florida, in your journey?

MR. HOWARD: Objection to the leading form of the question.

THE COURT: The objection will be sustained.

MR. LONG: All right.

THE WITNESS: When Peggy and Al dropped me off—.

MR. HOWARD: Objection, Your Honor; no question pending.

BY MR. LONG: (Cont'g.)

Q Please continue.

A It was over the Skyway Bridge when Peggy and Al dropped us off.

Q What happened when they dropped you off?

A I don't recall if I got another ride; I only recall three rides.

Q Where did you go after they dropped you off, your friends, after the Sunshine Skyway Bridge?

[500] A We was on the road hitchhiking.

Q Did you get another ride?

A Yes.

Q Where did that ride take you?

A I'm not sure. I recall a man in a white Cadillac; he said he was a Cadillac dealer. I recall that ride; he had a white suit on and a white hat.

And I recall another ride. I don't know where he dropped us off. I recall another ride by a small vehicle, one man driving it.

Q What was the color of the small vehicle?

A I'm not sure in my mind; I think is was green.

Q Where did that ride take you?

A To Fort Myers.

Q Fort Myers, Florida?

A Yes.

Q Where did that ride end in the small green vehicle?
A Fort Myers, Florida.
Q Do you know where specifically?
A No.
Q All right. When the vehicle stopped, what did you and Mr. Milroy do then?
A We didn't get a ride right away. My suitcase [501] was on the ground, and a blanket on top of my suitcase.
Q What happened next?
A We were hitchhiking waiting for a ride.
Q That was in Fort Myers?
A Yes.
Q What happened then?
A That man over there (indicating) pulled to the side of the road and Terry and I got in his truck, and he gave us a ride to the field where he killed Terry and raped me. That man over there (indicating).
MR. LONG: Let the record reflect the witness has identified the Defendant.

BY MR. LONG: (Cont'g.)

Q Now, if you can—I know this is difficult, but try to maintain your composure. I know it's hard, but take a few deep breaths.
A I don't know how I went through with this.
Q What type of vehicle was that man—.
A He was driving a truck, a green truck—
Q All right.
A —black leather vinyl seats in the front. I recall the oil light going on and off; no door handle on the passenger's side door; it had a rounded hood.
Q Where did you sit in the vehicle?
A In the middle.
[502] Q What, if anything, did you smoke while you were in the vehicle?
A Marijuana.

Q How many marijuana cigarettes did you smoke while in the green truck?

A One.

Q When you were in the light green vehicle you described from dropping you off in Fort Myers, how many marijuana cigarettes—.

A. One.

Q Was the cigarette you smoked in the light green vehicle consumed by yourself solely or by others as well?

A I believe it was by myself.

Q With regards to the marijuana cigarette that was smoked in the green truck in which you have identified the Defendant picking you up, was that cigarette consumed by yourself or shared by others as well?

A The three of us smoked.

Q Who was the three?

A I believe I was the one that took it out of my pocket.

Q What did you do with it?

A Lit it up.

Q What happened with it after that?

[503] A The three of us smoked it.

Q You say the three. Did that person over there smoke marijuana as well?

A You're talking about—.

Q Did the Defendant smoke marijuana as well in this ride?

A Yes. I relit it a couple of times for him because it went out.

Q Where was it when you relit it for him?

A In his mouth.

Q Were you under the influence of marijuana when you were in the green truck?

A Yes. I don't consider myself—I smoked marijuana many times. I know what it's like smoking one marijuana cigarette. I don't consider myself as not knowing what I was doing under the influence of that marijuana cigarette.

Q Getting your attention back to when you and Mr. Milroy were picked up in the green vehicle, please carefully describe what happened then.

A The green vehicle before Tibbs?

Q Excuse me. The green truck.

A What happened?

Q What happened then after you and Mr. Milroy were picked up?

[504] A I don't recall if he opened the door first or if Terry opened the door. My suitcase and the blanket—I was standing back, it was a few feet before where he stopped the truck.

Terry walked to the truck. I don't recall if the door was open or if Terry opened the door. Terry said, "Come on," and I picked the suitcase up; the blanket I put in the back of the truck. I got in the truck; Terry got in the truck.

I believe it was Terry that asked him where he was going. He said to Naples. Both of us—he asked us—both of us replied, "Great, it's on the way." Terry, he asked—the Defendant asked us where we were going. We said to the Keys, to Marathon.

I recall going up the road. I don't recall how long it took us to a road which he made a right, I believe, with pine cone trees on both sides of the road, as I recall it. That was a hard-top road. He went further down the road. I don't remember which way he turned. It was a dirt road.

Excuse me. I'll get back to the pine cone trees. I made a reply, "This is different, I never knew they had pine cone trees in Florida, this reminds me of the north." This is gong down the dirt road.

I'm not sure if it was Terry or I that asked [505] him what was growing in the field. He answered cucumbers and squash. That was a field supposedly he'd worked at planting cucumbers and squash. I don't remember which way he went into the field. He pulled next to two vehicles. He pulled next to a farm machine and a vehicle, a truck, I believe, to the best I can recall it.

He got out of the truck. He said, "Terry—." He didn't say "Terry," he didn't use Terry's name. He said, "Can you give me a hand, brother?" Terry said, "Sure." He was already out of the truck. Terry got out of the truck, went to the back of the truck. I was still sitting in the truck.

I don't knew what was said. Maybe a minute went by, to the best I can recall the time. I went to the back of the truck. He had a gun out, which I believe was in his right hand. He had a gun out, which I believe was in his right hand, pointed—Terry and I was on this side (indicating), he was on that side (indicating).

The first thing that come out of him is, "Look, I'm a man in serious trouble." Terry asked him what kind of trouble he was in. He said, "I can't say nothing." Terry says, "Is there anything we can do? Is it money you need? Is there anything we can help [506] you, sir?" He didn't say anything. Terry said, "What is it, you want to"—he used the word—"F my old lady?" He looked at me and Terry. He says, "Yeah, I want her. Okay?"

Q Who said that?

A The Defendant.

Q What did he say?

A "I want her. Okay?"

Q What happened then?

A Naturally, the man had a gun in his hand. Terry looked at me and he said, "All right, Cin?" What am I supposed to say? He had a gun in his hand. I said, "All right." He told me to strip. Terry was standing there, I was embarrassed.

Just give me a minute. I want to go on with it, just give me a minute.

He told me to make him hot. I never did this before, I couldn't do it. That's one thing I don't enjoy doing one bit. Why I did, it was the only thing that had come to my mind at the time. I put my mouth on his penis.

He started urinating and discharging into my mouth. I was gagging and spitting it out. He says, "You don't do that, little girl."

Terry is asking him, begging him, "Please, can I go, sir? I won't say anything." "Yeah, you can [507] go," —with the gun in his hand—straight out that way (indicating)."

Tell the Defendant to look at me. Tell him to look at me.

Q That's all right. Let's continue.

A I don't recall how my mouth come off his penis. I recall him taking one or two steps. Wait a minute. Terry's walking away. He's going—I'm not positive, I believe he was saying, "You're sure you're not going to kill me, you're sure?" Terry's walking away. He took one or two steps, aimed the gun to where Terry was walking.

I can't honestly say I seen him shoot him. I heard the shot, I looked, Terry fell to the ground. I wanted to go over to him so bad, so bad. Something inside told me not to. I didn't go over to him, I stayed by the truck.

I believe this is when this incident took place. The Defendant walked over to where Terry's body—to where Terry was laying. I'm not positive—he picked something up off the ground, which I believe was the case of the bullet which he shot Terry the first time. Terry has his hands over his head and he's saying, "Please don't kill me, sir. Please, I'll do anything. Please don't kill me, sir. Please."

[508] "Does it hurt, boy? You in pain? Does it hurt, boy?"

Q Who said that?

A The Defendant.

Q Please continue.

A Terry's in shock. He's scared and in hysterics. He aimed the gun at his head. I couldn't look, I knew he was going to kill him. I heard a shot go off. Terry let out a scream. I knew he was dead.

Q What happened then, Miss Nadeau?

A Excuse me a minute. Could I have a Kleenex? I'm not lying.

Q What happened next?

A Then he walked back over to me; the Defendant walked back over to me.

I can't go on right now. Just give me a minute.

Q Take your time.

A The Defendant walked back over to me. I was scared, I was definitely scared. I must have been in hysterics. I can't recall any actions as to how scared I was until—I must have been in shock—until he says to me, "Over there." To the best of my knowledge, I can recall it as being brown paper sacks which maybe cement or something went into. He said, "Lay down. [509] Over there, lay down."

I laid down. I knew my life—I knew I was going to be dead. I just did what he said. I laid down, he got on top of me. He put his penis in me, it wouldn't stay in. I didn't want to do it, that was the only thing that was going to save my life. I put my hand down and tried to help him out—in my mind maybe if I satisfied him, he wouldn't kill me—it wouldn't stay in.

He got up, I got up. I don't recall what I said to him. It must have all hit me at one time. I'd said something he didn't like. The gun was in his hands still; he slugged me over the head with the gun. My knees were knocking, I was urinating, I was scared. "Who you trying to kid, girl, your'e not scared."

Q Who said that?

A The Defendant.

Q What happened then?

A I was shaking like a leaf, my knees are knocking, I'm urinating. I asked him if I could get dressed and he said no. The blanket and suitcase was in the back of the truck; I went and got the blanket.

No. He slugged me over the head with the gun. I put my hand to my head, it was bloody. I went to the

truck, asked him if I could get dressed, he said [510] no. I went to the truck, got the blanket out of the back of the truck, held it over the front of my body up close to my neck—knowing he was going to kill me at any minute—and to my head where he slugged me.

A few minutes went by—I'm not sure of the time—to the best I can recall, a few minutes went by. He didn't say anything for a few minutes. He said, "Get dressed." My clothes were over the back of the truck where I'd put them when I took them off. I put my pants on, my shirt, my coat. I walked over to him—no—my coat—I walked over to him. I don't know how I could have did it after what he done to Terry and done to me, but I did. I put my arms on his hips, around his waist. I told him I would be his old lady; to "let's get out of here. What are we going to do with the body? Let's ditch the body. I'll do anything, I'll be your woman. Let's just get out of her now, let's go." I believe that convinced him.

He said, "Wait." I asked him why, was he going to kill me. He said he wasn't because he liked me.

Okay, the suitcase and blanket was in the back of the truck. My pocketbook was left on the front seat of the truck. No, no. The blanket was not in the truck, because I used the blanket to cover my body. The blanket was laying over the truck. He said, "Get [511] that," pointed, which was my suitcase. I don't remember if he told me to get them both at the same time, the blanket and the suitcase, or one at each separate time. He said, "Get that, take it—." There was, which in my mind is a drainage ditch where the brown paper sacks were nearby. He says, "Throw it in there." I did so. My pocketbook was in the front seat. I walked over to the truck. He said "Get that, throw it in there." I did so. Okay, He said—the door had to be open. If I got my pocketbook out, the door had to be open.

He said, "Get in the truck." I got in the truck. I don't recall if I closed the door or if he closed the door. He got in the truck, the gun still in his hand. He got

in the truck with the gun still in his hand. He told me to put my hands on my lap, to look out the passenger window. I did so. "Put you hands on your lap and keep them there, and look out the window." He pointed. He didn't say passenger window, he pointed. I did so.

He was leaving the field. I don't recall how we got out of the field. I don't recall. I'm looking out the passenger window the way he told me to. I don't recall what road we were on or how long of time it took us to get to the street where he told me—.[512] No. We're riding along. Self-consciously I'm wiping the dripping of blood from the side of my face. The Defendant said—the Defendant says, "You don't do that." The gun was pointed at me. Naturally, I put my hand back to my lap, my hand I was wiping the blood with.

We drive further up the road. Self-consciously I did it again, what he told me not to do. I wiped the dripping of the blood from the side of my face. The gun was pointed at me "The next time—. I told you don't do that. Next time I'll kill you." Well, by then I think it finally sunk through. I didn't do it again, take my hand off my lap and put it to my head to wipe the drippings.

I don't remember how long it took. I'm not positive, but I think I can recall—I'm not positive, but I think he stopped at a red light once. In the Defendant's truck leaving the field after everthing took place, to the best of my knowlewge I can recall it as making a right-hand turn. I can only recall three houses on this road. Which I believe the mailboxes were outside on poles in the yard of these houses.

Further up the road a half-mile—I say a half mile—there were trees on both sides of the road. [513] He pulled a little off the paving of the road, I believe, stopped the truck. In my mind it's my only chance, he's going to run me over. "Get out of the truck now, get out."

Q Who said that?

A The Defendant. "Walk directly—." Nope, I can't be positive he said it that way. Walk straight ahead or directly in front of the truck. I can't be positive which one he said, it was either one of the two.

There was no door handle on the inside. I don't remember if the window was down or I put it down. But I do recall having to reach out and open the truck door from the outside. I did that. I'm not positive, but I believe one foot was down before the other. As soon as my feet hit the ground, I ran. I did just the opposite of what the Defendant told me. I ran as fast as I could up the road.

I believe he took off when—there was a car coming down the road the opposite way of which the Defendant was heading. I believe he seen the headlights of the car, and once he seen that—.

MR. HOWARD: Objection, if the Court please.

THE COURT: Objection sustained. Facts. [514] Don't say what you think.

THE WITNESS: All right. I believe—.

MR. LONG: Excuse me. Don't tell me what you believe.

THE WITNESS: All right. The Defendant seen a car coming up the road. I can't—nope—I can't say that, because I did not see his face, I was running. So I cannot say that.

BY MR. LONG: (Cont'g.)

Q Please continue.

A There was a car coming down the road. I'm running as fast as I could. I'm in the middle of the road trying to flag this car down, which he took off. He's already gone, the Defendant is already gone. I'm a little ways down the road trying to flag this car down. What does the car do? Goes completely around me.

I kicked—I had closed sandal-type shoes on. I kicked them off to run faster. I recall running to this house which I believe was on the left-hand side of the road. When I'm running, it was on the left-hand side of the road. A man—I'm pounding on the door, "Call the police, call the police. He murdered my friend and raped me." This man is looking out the [515] window, out the door window. He doesn't let me in right away. I don't know

how long, but I know it couldn't have been more than a few minutes. I got in the house. The man let me in, I got in the house. I believe there was a woman there, which was probably his wife—I can't say—a girl and the man that let me in. I'm pretty hysterical, I'm in hysterics. "Did you call the police? Did you call the police? He murdered my friend and he raped me." The man told me to shut up. I asked the girl—I asked the girl where the bathroom was. I went into the bathroom. I don't remember if she gave me the facecloth or if I picked it up from the sink. I picked up the facecloth, washed my face, put the facecloth to my head where he slugged me with the gun, where the Defendant slugged me with the gun.

I believe, to the best I can recall, the sheriff finally come to the house. I ran to him. "He murdered my friend. He murdered my friend and raped me." I was saying, "I don't care about me. I don't care about me. I just want to find my friend." My self-conscious mind must have been telling me he was still alive.

I went to a field. With whom I don't recall. It was one of the sheriffs or Tom Wallace. I went to [516] a couple of fields,—I wasn't familiar with the Fort Myers area—couldn't find the field to where he murdered Terry and raped me. I recall—I remember—I don't know which one said it to me, "It's time you go to the hospital." There was an ambulance—I'm not positive—I think in a parking lot. I got into the ambulance and went to the hospital.

Q What happened at the hospital, Miss Nadeau?

A I remember laying on the bed. Excuse me. I remember laying on a bed asking them if where he slugged me with the gun was bad.

Q You've been going 45 minutes. Would you like a recess now? Would you like to take some time?

A Please.

MR. LONG: Would it be all right with the Court if she has a few minutes?

THE COURT: If there's no objection from the Defense.

MR. HOWARD: No objection.

THE COURT: We'll take a break.

Ladies and gentlemen, take about a ten-minute break. We'll call you when we're ready. Please retire to the Jury Room.

(Proceedings recessed.)

(Proceedings resumed following recess.)

[517] THE COURT: Does the State have anything before the Jury is returned?

MR. LONG: No, Your Honor.

THE COURT: Does the Defendant have anything?

MR. HOWARD: No, Your Honor.

THE COURT: Bring the Jury in, please,

(Jury returned to the Courtroom; the following proceedings had in the presence of the Jury.)

THE COURT: Mr. Long.

BY MR. LONG: (Cont'g.)

Q Cindy, when you went to the hospital, what name did you give them?

A (Answer inaudible.)

THE COURT: Speak up.

Q When you went to the hospital, what name did you register in?

A My sister's name, Sandy Nadeau.

Q Why did you do that?

MR. HOWARD: Objection. I withdraw that objection. I'm sorry, go ahead.

MR. LONG: You're sure?

MR. HOWARD: I'm sure.

THE COURT: He's withdrawn his objection.

Q Why did you register under the name of Sandy [518] Nadeau?

A I put my parents through quite a bit. I left home at 14; I ran away quite a few times before then. I knew how my parents would react if they got a telephone call what happened to their daughter. I would much rather tell them myself. That's why I used my sister's name.

Q What address did you give when you gave the name Sandy Nadeau?

A Kendall's Trailer Park.

Q Where is that located?

A St Petersburg.

Q In regards to your identification, were you shown photographs of individuals?

A At the sheriff's department—yes, many photos.

Q How many photos did you see?

A I don't recall how many, but many.

Q More than 50?

A Yes.

Q More than 75?

A It was many. How many is in a book? I seen a couple of books, packages of photos, separate photos. I seen so many photos I can't recall how many.

Q Did you actually see a photograph of the [519] person you identified as the person who raped you and murdered Terry Milroy?

A Later on.

Q Did you at any time see a photograph of an individual who you identified as raping you and murdering Terry Milroy?

A Yes.

Q At this time I'd like to show you what's been introduced into evidence as State's Exhibit Number 5, and ask you if you recognize that photograph.

A Yes.

Q Who is the person in this photograph?

A The Defendant.

Q Looking carefully at that—excuse me—strike that. There's one other photograph I'd like to show you. I'd

like to show you a photograph that's been introduced into evidence as State's Exhibit Number 4, and ask you if you recognize the person in this photograph. Look at it carefully. Do you know who that person is?

A Terry Robert Milroy.

Q And he was the person that you observed shot twice in this field that night?

A Yes.

Q Were you ever present at a line-up?

[520] A Yes.

Q Do you recall when that line-up was? Was it before or after you observed that photograph that you have identified already?

A After.

Q How many persons were in that line-up?

A Four.

Q And I'll show you what's been introduced into evidence as State's Exhibit Number 6, and ask you to please look at that photograph. Do you recognize anybody within that photograph?

A Number two.

MR. LONG: Let the record reflect number two is a person in a line-up who is Delbert Tibbs.

Q What happened at the line-up?

A Tom Wallace and I believe it was Lieutenant Schmidt walked me over to where the line-up took place. I looked in. There was four people, four persons. I looked at him and all the rest, I looked at them all. Mainly, as soon as I seen the four people, he hit me like that it was him. I looked at him and I used—I said —.

Q What did you say?

A I called him a —.

[521] Q Say exactly what you said.

A Fucker. I says, "Number two, right? Tell me now, tell me now." Lieutenant Schmidt says, "You tell us." I went and looked again. I called him a fucker. He was staring me eye to eye and I said "Positively number two. Tell me now."

Q Would you please come down here.

A (So doing.)

Q Would you please go over and stand in front of that table. I want you to be positive there's the person in this Courtroom that raped you and murdered Terry Milroy on February 3rd, 1974. Go look at that person's face.

A (So doing.)

Q Is the person in here?

A Yes.

Q Would you please just point your hand.

MR. LONG: Let the record reflect the Witness has identified the Defendant, Delbert Tibbs.

I have no further questions, Your Honor.

THE COURT: Mr. Howard.

MR. HOWARD: May I proceed, Your Honor?

THE COURT: Yes.

• • • •

[602] MR. HOWARD: No objection.

THE COURT: We'll take a ten-minute recess.

(Proceedings recessed.)

(Proceedings resumed following recess.)

THE COURT: Anything to come before the Court before the Jury returns?

MR. LONG: No, Your Honor.

MR. HOWARD: No, Your Honor.

THE COURT: Return the Jury, please.

(Jury returned to the Courtroom; following proceedings had in the presence of the Jury.)

THE COURT: Mr. Howard, do you have any further questions of this witness?

MR. HOWARD: Yes, just a few more, if the Court please.

BY MR. HOWARD: (Cont'g.)

Q Miss Nadeau, this morning when questions were put to you on direct examination concerning the identi-

fication of the assailant, you were quite sure Delbert Tibbs here was the person.

A I'm positive.

Q All right. When you appeared before His Honor Judge Shands on the afternoon of December the 10th, just [603] three days ago, while Mr. Tibbs was seated in the Judge's hearing room, you looked through the door and seen Mr. Tibbs at that time.

A Would you like to hear something that's better than that?

Q Yes.

A Yes, I did. Not only did I see him that day and know for sure it was him, but Mr. Tibbs got up out of his seat like that. I was so scared a few mornings before to go in that room because I seen him in there getting up out of his seat when the door opened.

Q You'd seen him a few mornings before that, before February the 10th?

A February the 10th?

Q I mean December the 10th.

A I'm sorry, December 10th.

Q You seen him in that room before that time?

A No, I'm sorry, that's the day. I thought you were talking about yesterday when he was looking through the glass.

Q I'm talking about three days ago, December 10th. When you were out in the hallway, you looked through the door and seen Tibbs in the Judge's hearing room? The question is: Did you see him?

A Yes, I did.

[604] Isn't it true that when you saw him, you made this statement, "That's him, isn't it?" Did you ask Officer Schmidt and Officer Wallace if that wasn't him?

A Yes, I did. I said, "That's him, isn't it? He's in there, isn't he? I don't want to go in there."

Q You weren't sure, were you?

A I was sure, yes.

Q Again, yesterday while these proceedings were going on, at the recess isn't it true that you were standing

in that door looking through that glass, looking directly across the room at Tibbs?

A Yes.

Q You were trying to make sure yesterday, were you not?

A I wanted him to look at me.

Q I'm putting a question to you, please. Weren't you trying to make sure you would make no mistake during the course of this trial and identify the wrong man, so you were taking every opportunity to get a chance to look at the man you knew would be on trial?

A No, I was not.

Q Why, then, were you looking through the door, Miss Witness, at Mr. Tibbs?

A I wanted him to know I was looking at him, and I'm going to court and testify.

SUPREME COURT OF THE UNITED STATES

No. 81-5114

DELBERT LEE TIBBS, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 2, 1981

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Opposition

Cm & KD

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SUPREME COURT, U.S.

NO. 81-5114

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DELBERT LEE TIBBS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

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10/

QUESTION PRESENTED

DOES THIS COURT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257 (3) TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF FLORIDA WHICH REVERSED INTER ALIA, A DEATH SENTENCE AND REMANDED THE CAUSE TO THE TRIAL COURT FOR FURTHER PROCEEDINGS FROM WHICH A DIRECT APPEAL WOULD LIE AND, IF SO, WHETHER DOUBLE JEOPARDY PROHIBITS THE RETRIAL OF PETITIONER WHERE PETITIONER FOLLOWING CONVICTION PROSECUTED AN APPEAL THEREFROM RESULTING IN A REVERSAL AND REMAND IN THE INTEREST OF JUSTICE?

PARTIES

In the Supreme Court of Florida, on Petition for Writ of Certiorari to the District Court of Appeal of the State of Florida in and for the Second District, Petitioner TIBBS was the petitioner and the STATE OF FLORIDA was the respondent.

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida upon which review is sought is reported as Tibbs v. State of Florida, 397 So.2d 1120 (Fla. 1981). The original opinion of the Florida Supreme Court on direct appeal and wherein the Court reversed the conviction and remanded for a new trial is reported as Tibbs v. State of Florida, 337 So.2d 788 (Fla. 1976).[1/] The opinion of the Second District Court of Appeal of the State of Florida in and for the Second District, wherein the appellate court reversed the trial court's order granting, on re-trial, petitioner's Motion to Dismiss the Indictment is reported as State of Florida v. Tibbs, 370 So.2d 386 (Fla. 2nd DCA 1979). (Attached hereto as Respondent's Exhibit A is a copy of the aforementioned Opinion of the Second District Court of Appeal).

CONSTITUTIONAL PROVISIONS

Double Jeopardy Clause, Fifth Amendment to the United States Constitution.

1/ The opinions of the Florida Supreme Court correctly appear in Appendix A and C respectively of the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged in a three count indictment with the rape of Cynthia Nadeau, the premeditated murder of Terry Milroy and the crime of felony murder for killing Milroy while raping Nadeau. A twelve person jury evaluated the evidence, including the credibility of the witnesses and found petitioner guilty of first degree murder and rape. A death sentence was recommended by the jury for murder, and the trial judge imposed the death penalty for the crime. Petitioner was also sentenced to life imprisonment for the rape. Petitioner prosecuted a direct appeal to the Florida Supreme Court to review the convictions.

The Florida Supreme Court on direct appeal, Tibbs v. State, 337 So.2d 788 (Fla. 1976) set forth the relevant facts of the crime as follows:

> The relevant facts of the alleged crime, as brought out on trial, were these. Nadeau and Milroy were hitchhiking to Marathon from St. Petersburg, when they were picked up in Fort Myers by a man alleged to be driving a green truck with a rounded hood, black vinyl seats, no door handle, and an oil light that blinked on and off. This man drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where the driver was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay. Milroy pleaded with the driver not to kill him, but the man shot him again, inflicting the fatal wound. The driver then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered to get out and walk in front of the truck. She left the truck, but was able to run and successfully escape.
>
> Id at 789.

The surviving victim unequivocally identified petitioner as the perpetrator of the offenses.

The Florida Supreme Court characterized petitioner's contention on appeal to be that "there [was] no evidence to corroborate the testimony of [the]. . . rape victim, and that her testimony was so riddled with conflicts and [was] so inherently unreliable that his convictions and attendant death sentence should be reversed." Id at 789, 790, emphasis added. The petitioner also contended and the Court found that no credence could be given to the testimony of a jailmate to the effect that petitioner had confessed to the crime.

In reaching disposition of the cause the Court recognized that under Florida law it was the Court's "obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a new trial." Id at 790. The Court noted that the law in Florida was well established that no corroborative evidence is required in a rape case when the victim can testify directly to the crime and identify the assailant; this standard was applicable to the rape-murder crimes with which petitioner was charged. The Court in reversing and remanding for a new trial found that there were several "infirmities" in the evidence and that several features of the victim's testimony "cast doubt on her believability." Id at 791. The convictions were reversed and the cause remanded for a new trial.

Subsequent to the reversal, the State initiated retrial. Petitioner moved to dismiss the indictment and the trial judge found that in light of Burks v. United States, 437 U.S. 1 (1978) and Greene v. Massey, 437 U.S. 19 (1978) that retrial would violate the Double Jeopardy Clause of the Fifth Amendment. The State appealed to the Second District Court of Appeals and the Order granting the Motion to Dismiss was reversed in State of Florida v. Tibbs, 370 So.2d 386 (Fla. 2nd DCA 1979). The District Court of Appeals determined that the Florida Supreme Court's previous reversal was not based on a legal insufficiency of the evidence but "rather was bottomed upon the majority's view that the evidence was inherently weak and seriously contradicted, and

that Tibbs should be accorded the opportunity to be tried before another jury in the interests of justice." Id at 388. The Court accordingly found that retrial would not violate double jeopardy and remanded to the trial court for further proceedings.

Petitioner thereafter petitioned the Florida Supreme Court for a Writ of Certiorari to the Second District Court of Appeal. Petitioner asked the Florida Supreme Court to rule that its previous reversal of his original conviction was based on the legal insufficiency of the evidence. The Court declined to do so and held that its previous opinion "was one of those rare instances in which reversal was based on evidentiary weight." Tibbs v. State, 397 So.2d 1120, 1126. The Court recognized that:

> Tibbs' conviction rested primarily on the uncorroborated testimony of the rape victim, Cynthia Nadeau. Although this testimony alone was legally sufficient to support Tibbs' conviction under Florida law, Thomas v. State, 167 So.2d 309 (Fla. 1964), we reversed his conviction due to a number of "infirmities in the evidence establishing Tibbs as the perpetrator" of the crime. Among these infirmities were several aspects of Nadeau's testimony which cast serious doubt on her believability. In effect, we reweighed the evidence supporting Tibbs' conviction and remanded for a new trial.
>
> Id at 1126.

Thus, the Florida Supreme Court on certiorari in effect held that as Tibbs' previous convic ions were reversed in the interest of justice upon reweighing the evidence and determining the credibility of the witnesses as opposed to a reversal because the evidence was insufficient as a matter of law, double jeopardy did not preclude retrial. The decision of the Second District Court of Appeal was affirmed.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Section 1257(3) of 28 U.S.C. limits the jurisdiction of this Court to review by certiorari only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." Respondent respectfully submits that the decision rendered by the Supreme Court of Florida in Petitioner's case is not a "final judgment" within the meaning of 28 U.S.C. § 1257, and consequently, that the Petition for Writ of Certiorari filed herein should not be granted. Mincey v. Arizona, 434 U.S. 1343 (1977, Rehnquist, Circuit Justice); Chapman v. California, 405 U.S. 1020 (1972); Whitus v. Georgia, 385 U.S. 545 (1967).

The fundamental question with respect as to when a judgment is "final" is whether it can be said that there is nothing more to be decided or that there has been an effective determination of the litigation. Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69 (1946). That is, for a judgment of a state appellate court to be final and reviewable, it must end the litigation by judicially determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. Parker v. Illinois, 333 U.S. 571 (1948); Organization for Better Austin v. Keith, 402 U.S. 415, (1971); and Market St. Ry Co. v. Railroad Commission of State of Cal., 324 U.S. 548 (1945). This Court has made it clear that a state court judgment, to be within the appellate jurisdiction of this Court, must be "final" in two senses: It must be subject to no further review or correction in any other state tribunal, and must be an effective determination of the litigation and not

of mere interlocutory or intermediate steps therein.

Thus, traditionally, the final-judgment rule has precluded Supreme Court review "where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court in the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). This rule is not iron clad, however, and the Court has recognized certain exceptions to the final-judgment rule. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Viewing the case at bar in the context of the finality requirements referred to hereinabove, it is patently clear that the judgment of the Florida Supreme Court is not "final" so as to confer jurisdiction upon this Court. It is apparent that the trial court's labors are not at an end. Notwithstanding the Florida Supreme Court's decision, a trial of the factual issues is necessary. Moreover, a Florida appellate court will have to review the particular facts and circumstances of any conviction notwithstanding their prior ruling on the singular issue presented and disposed of: Whether following a previous conviction and successful appeal, the indictment should be dismissed on the grounds that double jeopardy precludes retrial? This case is markedly different than Harris v. Washington, 404 U.S. 55 (1971) wherein this Court held jurisdiction to be properly invoked where the State courts rejected a claim that retrial following acquittal was barred by the double jeopardy clause. In the case at bar, petitioner was convicted of the offenses and chose to prosecute an appeal.

Respondent suggests that Florida's right to a speedy trial, Dickey v. Florida, 398 U.S. 30 (1970), militates against the delay which would result by review at this stage of the legal proceeding. This Court has noted that the requirement of finality is to avoid the mischief of economic waste and of delayed justice. Radio Station WOW v. Johnson, supra, and it is submitted that a delay of a criminal trial might well make it impossible for the State to later prove the truth of the allegation contained in the

indictment.

Respondent respectfully suggests that the judgment sought to be appealed is not a "final judgment" and this Court should decline to exercise its jurisdiction in the matter.

II

Even assuming the opinion rendered by the Florida Supreme Court is a "final judgment" Respondent suggests that no important federal question is presented by the petition filed herein. Petitioner contends that retrial following the Florida Court's reversal of his previous convictions would violate the principle established by Burks v. United States, supra, and Greene v. Massey, supra. However, in essence, petitioner seeks to expand the concepts of Burks and Greene.

Burks holds that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence "legally insufficient" to support the guilty verdict. Burks v. United States, supra at 18. Although Burks involved a federal prosecution, this Court in Greene v. Massey, supra, held that the double jeopardy principle in Burks fully applies to the States. See Benton v. Maryland, 395 U.S. 784 (1969). Burks and Greene thus establish that a fundamental component of the prohibition against double jeopardy is the right not to be retried once a reviewing court has found the evidence insufficient as a matter of law to support the jury's verdict.

In the instant case, it is apparent from the express language of the Florida Supreme Court that petitioner's convictions were not reversed because the evidence was insufficient as a matter of law to support the jury's verdicts. In the original decision, Tibbs v. State, 337 So.2d 788 (Fla. 1976), wherein petitioner's convictions for rape and murder were reversed, the Court noted that the law in Florida was well established that no corroborative evidence is required in a rape case when the victim can testify directly to the crimes and identify her assailant and that such standard was applicable to the rape-murder crimes with which petitioner was charged. However, the Court held that

the standard for review under Florida law was to review the conviction for which the death sentence had been imposed to determine if the interests of justice required a new trial.[2/]

Although at trial the victim did testify directly to the crimes and unequivocally identified petitioner as the perpetrator of the offenses, the Court, in determining whether the interests of justice required a new trial, assessed her credibility and found that several features of her eyewitness testimony "cast doubt on her believability." Id at 791. The Court also found that "no credence" could be given to the testimony of Tibbs' jailmate to the effect that Tibbs confessed to the crimes and that "several infirmities" were present in the evidence.[3/] Id at 790. The Court assessed and determined the credibility of the witnesses and found that although the evidence was legally sufficient under Florida law to support the verdicts, the interest of justice required that petitioner be afforded a new trial. Petitioner's convictions were reversed and the cause remanded for a new trial.

2/ Fla. Stat. § 921.141(1975) provided in pertinent part:

> (4) REVIEW OF JUDGMENT AND SENTENCE. - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

Fla. R. App. Pro. Rule 6.16(b) provided in pertinent part:

> . . . Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

3/ The "infirmities" consisted of a lack of evidence, other than the eyewitness testimony of the victim, that petitioner was in the area where the crimes were committed on the date in question; no trace was found of the truck which the victim stated was driven by petitioner; no gun or keys were found in Tibbs' possession; when Tibbs was stopped on three occasions by police on the basis of the description issued by the victim, he cooperated with the police; and no evidence was introduced casting doubt on Tibbs' veracity.

Subsequently, on certiorari to review the reversal of the trial court's order granting the motion to dismiss the indictment, the Florida Supreme Court specifically rejected petitioner's request that the Court rule its previous reversal was based on the legal insufficiency of the evidence. The Court in Tibbs v. State, 397 So.2d 1120 (Fla. 1981) held that the evidence, although it primarily consisted of the victim's eyewitness testimony, was "legally sufficient[4/] to support Tibbs' convictions under Florida law." Id at 1126. The Court further held that Tibbs' convictions were reversed due to a number of infirmities in the evidence and because certain aspects of the victim's testimony cast doubt on her believability.

Thus, the highest court of the State of Florida, in reviewing its previous reversal, unquestionably held that the prior reversal was not based on a finding that the evidence was legally insufficient but rather the convictions were reversed in the interest of justice after reweighing the evidence and assessing the credibility of the witnesses.[5/]

4/ The Court defined the term "legally insufficient" to mean that the prosecutor failed to prove the defendant's guilt beyond a reasonable doubt.

5/ The Florida Supreme Court recognized that after Burks the double jeopardy implications of two categories of appellate reversals - reversals for insufficient evidence and reversals for trial error - seemed relatively clear. However, the Second District Court of Appeal in reversing the trial judge's Order granting the Motion to Dismiss on retrial, recognized that Florida law provided for a third category of appellate reversals: appellate reversals where the evidence is technically sufficient but its weight is so tenuous or insubstantial that a new trial is ordered in the interests of justice. The Florida Supreme Court held that elimination from State law of this third category of appellate reversals would accord Florida appellate courts their proper role in examining the legal sufficiency of the evidence and would leave questions of weight for resolution by the jury or trier of fact. Thus the Supreme Court eliminated any further reversals by the appellate courts on the ground of evidentiary weight, leaving under Florida law, future appellate considerations regarding evidentiary value to be only a determination of whether the evidence was or was not legally sufficient.

Moreover, this conclusion is patently obvious from the initial Florida Supreme Court's decision wherein the convictions were reversed.

It is clear that the double jeopardy guarantee "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." (emphasis in original) North Carolina v. Pearce, 395 U.S. 711 at 720 (1969) and the one exception to this rule is that double jeopardy will preclude retrial after a conviction has been reversed because of a legal insufficiency of the evidence. See United States v. DiFrancesco, _____U.S._____, 66 L.Ed. 2d 328 (1980). Indeed, Burks precludes retrial only where the State has failed as a matter of law to prove its case. See Hudson v. Louisiana, _____U.S._____, 67 L.Ed. 2d 30 (1981).

Unquestionably the convictions in the case at bar were not reversed because the evidence was insufficient as a matter of law; the trial judge could not have properly granted a motion for judgment of acquittal.

Petitioner, sub judice, following a trial by a jury of his peers, was convicted of rape and murder. He prosecuted an appeal and his convictions were reversed by the Florida Supreme Court in the interest of justice. "It is elementary in our law that a person can be tried a second time for an offense when his prior conviction for the same offense has been set aside on appeal." United States v. Ball, 163 U.S. 662 (1896). As the evidence adduced at trial was sufficient as a matter of law to support the jury verdicts the Burks and Greene exception is not applicable. Double jeopardy does not preclude the retrial of petitioner herein.

CONCLUSION

The opinion of the Supreme Court of Florida sought to be reviewed by this petitioner is not a final judgment, and thus the jurisdiction of the Court has not been properly invoked. Moreover, the question presented by petitioner presents no important federal question. The question was of particular

importance only to the law of the State of Florida and indeed shall never again present itself in this State. The petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MICHAEL A. PALECKI , Counsel for Respondent, and a member of the United States Supreme Court, in accordance with Rule 28(5)(b) of the Rules of the Supreme Court of the United States, hereby certify that on the 9th day of October, 1981, I served three copies of the Brief in Opposition to Petition for Writ of Certiorari on Louis Beller, Esquire, 742 Lincoln Road, Suite 238, Miami Beach, Florida 33139, by a duly addressed envelope with postage prepaid.

Michael A. Palecki

MICHAEL A. PALECKI
Assistant Attorney General
Of Counsel for Respondent

STATEMENT OF MAILING IN ACCORDANCE
WITH RULE 28 (2) OF THE RULES OF
THE SUPREME COURT

BEFORE ME, the undersigned authority, personally appeared MICHAEL A. PALECKI, a member of the Bar of this Court, who under oath deposes and says that to his personal knowledge this document, properly addressed to the Clerk of this Court and first-class postage prepaid was mailed this date, October 9, 1981, via U.S. Mail, deposited in Tampa, Florida. Such mailing on this date is within the time period established by Order of this Court dated September 9, 1981, and is in accordance with Rule 28 (2) of the Rules of this Court.

Michael A. Palecki
MICHAEL A. PALECKI
Assistant Attorney General

Sworn to and subscribed
to before me this 9th day
of October, 1981.

Notary Public
My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 19 1982
BONDED THRU GENERAL INS. UNDERWRITERS

ceedings as may be appropriate consistent with this opinion.

The Petition for Writ of Prohibition in Case No. 78-1623 is denied.

DOWNEY, C. J., and LETTS and BERANEK, JJ., concur.

ON PETITION FOR REHEARING

Petitioner's Petition for Rehearing is granted. We overlooked appellant's second point regarding the trial court's refusal to award petitioner attorney's fees and costs. In view of our reversal of the trial court's order, it appears petitioner may be entitled to attorney's fees pursuant to Section 61.-1318(3), Florida Statutes (1978). Accordingly, on remand the trial court should determine if petitioner is entitled to attorney's fees and expenses under that statute and, if so, assess them.

DOWNEY, C. J., and LETTS and BERANEK, JJ., concur.

STATE of Florida, Appellant,

v.

Delbert Lee TIBBS, Appellee.

No. 78-1598.

District Court of Appeal of Florida, Second District.

March 28, 1979.

Rehearing Denied April 25, 1979.

A conviction was reversed for a new trial by the Supreme Court, 337 So.2d 788. On remand, the Circuit Court, Lee County, Jack R. Schoonover, J., found that retrial would violate the double jeopardy clause. On appeal by the State, the District Court of Appeal, Boardman, J., held that where upon view that evidence was inherently weak and seriously contradicted and that defendant should be accorded opportunity to be tried before another jury in interest of justice, retrial was not barred by double jeopardy clause.

Reversed and remanded.

Criminal Law ⇐193

Where reversal of conviction was not on basis of pure insufficiency of evidence but rather upon view that evidence was inherently weak and seriously contradicted and that defendant should be accorded opportunity to be tried before another jury in interest of justice, retrial was not barred by double jeopardy clause. U.S.C.A.Const. Amend. 5.

Jim Smith, Atty. Gen., Tallahassee, and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellant.

Louis R. Beller, Miami Beach, and Jerry Paul, Durham, N.C., for appellee.

BOARDMAN, Judge.

Appellee Tibbs' original conviction for rape and first-degree murder was reversed for a new trial by the Supreme Court of Florida. *Tibbs v. State*, 337 So.2d 788 (Fla. 1976). On remand the trial court concluded that to retry Tibbs would violate the double jeopardy clause of the fifth amendment to the United States Constitution and, therefore, granted his motion to dismiss the indictment against him. This appeal followed timely. We reverse.

The applicable law at the time the supreme court's decision was rendered was that where a defendant successfully sought reversal of a conviction, there was no double jeopardy upon a new trial. *See Forman v. United States*, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960); *Bryan v. United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950). However, in June of last year, the United States Supreme Court held in two separate cases that where an appellate court reverses a conviction solely on the

Burks v. United States 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). That rule was applied to the states in *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), a case arising from a Florida prosecution.

However, because of the varying interpretations that could be placed on the Florida Supreme Court's opinion reversing Greene's conviction, reported as *Sosa v. State*, 215 So.2d 736 (Fla.1968), the United States Supreme Court did not discharge defendant Greene, but remanded the case to the United States Circuit Court of Appeals for reconsideration in light of its opinions rendered in *Greene* and *Burks*. At this writing *Greene* is still pending before the Fifth Circuit.

The sole point on this appeal is whether the principles enunciated in *Greene* and *Burks* bar reprosecution of appellee on the ground of double jeopardy. Based upon careful review of the complete record, including the briefs filed by the attorneys for the parties, we answer the point in the negative.

Our supreme court has reversed a number of convictions where it found the weight of the evidence to be insubstantial, although not technically insufficient. For instance, in the case of *Williams v. State*, 58 Fla. 138, 50 So. 749 (1909), the Supreme Court of Florida weighed the evidence against the three defendants and concluded that the evidence strongly indicated that the jury must have been influenced by considerations outside the evidence as to two of the defendants. Significantly, the court went on to hold that while the evidence appeared to support the verdict as to the third defendant, reversal of the codefendants' convictions required a new trial for the third defendant as well to meet the "ends of justice."

In *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932), the court pointed to the serious nature of the penalty (life imprisonment) and ordered a new trial where although there was direct evidence identifying the defendant as the perpetrator of the crime, this evidence was "not satisfactory to the appellate court." 139 So. at 792. In *Woodward v. State*, 113 Fla. 301, 151 So. 509 (1933), the court, pointing to the weakness of the evidence, reversed the conviction and remanded for a new trial by another jury in order to serve the "ends of justice."

In *Skiff v. State*, 107 Fla. 90, 144 So. 323 (1932), the supreme court found that the evidence as to the previous chaste character of the victim was unconvincing and held that justice demanded a new trial. In *Fuller v. State*, 92 Fla. 873, 110 So. 528 (1926) the supreme court awarded a new trial on the ground that while there was some evidence pointing to the defendant as the guilty party, the evidence of identity taken as a whole was such that it was "considered just and right that another jury should pass upon the issues made." *See also Nims v. State*, 70 Fla. 530, 70 So. 565 (1915).

Perhaps the most succinct statement of this standard of review is: "Where the evidence is sufficient to sustain the verdict a new trial should not be granted unless it is clear that injustice will result if not granted." *State v. Coles*, 91 So.2d 200 at 202 (Fla.1956). This standard of review was recognized by this court in *Sosa v. Maxwell*, 234 So.2d 690 (Fla.2d DCA 1970), *cert. denied*, 240 So.2d 640 (Fla.1970), *cert. denied*, 402 U.S. 951, 91 S.Ct. 1635, 29 L.Ed.2d 121 (1971). After the Supreme Court reversed the convictions of Greene and Sosa and remanded for new trial, the defendants filed in this court a suggestion for writ of prohibition seeking to prohibit a retrial for murder in the first degree. In denying relief the court stated:

> Indeed, it would constitute an anomaly in law if an appellate court could not reverse and remand for a new trial if it was of the opinion that the evidence, while legally sufficient to support the jury's verdict, was so far from convincing as to require a new trial in the interest of justice.

Id. at 692.

In *Lowe v. State*, 154 Fla. 730, 737, 19 So.2d 106, 110 (1944), where the only evidence of the defendant's guilt of the rape charge came from the victim's testimony, in reversing and remanding for a new trial, our supreme court stated:

> We have held in many cases if, after a full and careful consideration of the entire record, the ends of justice will be best subserved in granting a new trial because of the inconclusiveness of the testimony offered to establish the essential facts necessary to constitute the crime, then, and under these conditions and circumstances, it becomes the duty of this Court to reverse the cause for a new trial.

In the instant case, where the only testimony against Tibbs was that of a former cellmate, who testified that Tibbs had admitted the charged crimes, and that of the rape victim who testified that Tibbs was her assailant, the Florida Supreme Court examined the credibility of the witnesses in light of the remaining evidence and concluded: "Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial." 337 So.2d at 791.

We are aware of Justice Boyd's specially concurring opinion in *Tibbs* in which is stated: "I base this conclusion [vacating the conviction and sentence and requiring a new trial] upon the weakness and inadequacy of the testimony against appellant given in the trial court." 337 So.2d at 792. This statement notwithstanding, we believe that the other members of the court who joined in the majority opinion reviewed the entire record, as they are mandated to do by statute,[1] and undertook to determine whether the testimony of the victim of the rape and Tibbs' cellmate was believable and substantial in character. The majority concluded that their testimony was not believable and not substantial in character. In our judgment the court was considering the weight of this testimony and not its technical sufficiency. The concluding language of the opinion set out previously tends to indicate to us that the reversal was ordered "in the interests of justice" rather than on the basis that the evidence was totally and completely insufficient to support Tibbs' conviction of first-degree murder and rape. Had the court intended to predicate its ruling on the ground of the insufficiency of the evidence it could have and we think it would have so stated. Former Chief Justice Roberts writing the dissenting opinion which was concurred in by two other justices of the *Tibbs'* court stated that "no reversible error is made to appear and the evidence in *the record before us does not reveal that the ends of justice require that a new trial be awarded.*" (Emphasis supplied). 337 So.2d 796-97.

We hold that Tibbs may be retried for the offenses for which he was convicted and that the double jeopardy clause of the fifth amendment would not in this case bar a second prosecution. The reversal of his conviction was not on the basis of pure insufficiency of the evidence but rather was bottomed upon the majority's view that the evidence was inherently weak and seriously contradicted, and that Tibbs should be accorded the opportunity to be tried before another jury in the interest or ends of justice. Therefore, we do not believe that the decisions of the United States Supreme Court rendered in *Greene v. Massey* and *Burks v. United States* require that this court affirm the ruling of the trial court granting Tibbs' motion to dismiss the indictment. Accordingly, we reverse the trial court's order granting Tibbs' motion to dismiss, and we remand for further proceedings.

REVERSED and REMANDED.

GRIMES, C. J., and RYDER, J., concur.

ON PETITION FOR REHEARING

BOARDMAN, Judge.

We have reconsidered this case in light of the recent Supreme Court of Florida case *McArthur v. Nourse*, 369 So.2d 578 (Fla. 1979). In *McArthur* the court held that where the evidence is legally insufficient to support a guilty verdict, retrial of the de-

1. "Under Section 921.141(14), Florida Statutes (1975), and Fla.App. Rule 6.16(b), it is our obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a new trial." *Tibbs v. State*, 337 So.2d 788, 790 (Fla.1976).

fendant is prohibited by the fifth amendment.

McArthur is not on point. In that case the conviction was clearly reversed for insufficiency of evidence. In the case before us the rationale for reversal of the conviction was weight of the evidence. The supreme court stated in *McArthur* that "[w]e specifically decline to rule upon the double jeopardy implications of appellate reversals based upon considerations of evidentiary weight." *McArthur, supra*, at 581, n.11.

Petition for rehearing DENIED.

GRIMES, C. J. and RYDER, J., concur.



Ronald D. NITZBERG, Appellant,

v.

Allan L. ZALESKY, and First Mortgage Investors, a Massachusetts Investment Trust, Appellees.

No. 78-1701.

District Court of Appeal of Florida, Third District.

April 3, 1979.

Rehearing Denied May 23, 1979.

Employee whose salary was reduced from $75,000 per year to $50,000 per year in response to mortgage lender's demand that the corporate employer reduce its overhead brought suit against the mortgage lender and against the president of the employing corporation, asserting causes of action for tortious interference with a contractual relationship. The Circuit Court, Dade County, [illegible], with justification in requiring plaintiff's corporate employer to reduce its overhead as a prerequisite to lending additional operational funds, the activities of the individual defendant in attempting to reduce overhead to save the corporation, were privileged; (2) the record was devoid of any facts to support the contention that the actions of the mortgage lender amounted to an unjustified interference with plaintiff's employment agreement, and (3) neither the mortgage lender nor the president of plaintiff's corporate employer was liable.

Affirmed.

1. Torts ⇐12

Where mortgage lender acted reasonably and with justification in requiring corporate borrower to reduce its overhead expenses as a condition to additional funding from the lender and where corporate borrower's president thereafter reduced an employee's salary from $75,000 per year to $50,000 per year, actions of both the mortgage lender and the corporate borrower's president fell within established privilege for persons having present existing economic interests to protect and, therefore, the actions did not give rise to a cause of action on the part of the employee whose salary was reduced for tortious interference with a contractual relationship.

2. Torts ⇐12

A contracting party has a privilege to interfere with a contractual or business relationship where the interference is necessary to protect his own contractual rights, provided that the interference is without malice.

3. Torts ⇐12

If a person has a present existing economic interest to protect, such as ownership interest or a prior contract right, he is privileged to prevent performance of a con-

Petitioner's Brief

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No. 81-5114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DELBERT LEE TIBBS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

WHETHER or not the retrial of DELBERT LEE TIBBS, should be barred on the grounds that retrial would violate the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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IN THE

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DELBERT LEE TIBBS,

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v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Florida

PETITIONER'S BRIEF ON THE MERITS

CITATIONS TO THE OPINION AND JUDGMENTS DELIVERED IN THE COURT BELOW

The Opinion of the Supreme Court of Florida upon which review is sought is reported as *Tibbs* v. *State of Florida*, 397 So.2d 1120 (Fla. 1981). The original opinion of the Florida Supreme Court on direct appeal and wherein the Court reversed the conviction and remanded for a new trial is reported in *Tibbs* v. *State of Florida*, 337 So.2d 788 (Fla. 1976). The opinion of the Second District Court of Appeal of the State of Florida in and for the Second District, wherein the appellate court reversed the trial court's order granting, on re-trial Petitioners' Motion to Dismiss the Indictment is reported as *State of Florida* v. *Tibbs*, 370 So.2d 386 (Fla. 2nd DCA 1979).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the Constitutional Provisions of the Double Jeopardy Clause of the United States Constitution, and the Fourteenth Amendment of the United States Constitution.

On June 3rd, 1981, the Florida Supreme Court refused rehearing on its Opinion of April 19, 1981, ordering a new trial for DELBERT LEE TIBBS. Since the original Tibbs case, *Tibbs* v. *State of Florida*, 337, So.2d 788 (Fla. 1976), was reversed prior to *Burks* v. *United States*, 437 U.S. 1 (1978), it is the Petitioners' contention that the Double Jeopardy Clause of the U.S. Constitution has been violated. The jurisdiction of this Court is invoked under the *U.S. Constitution and Title 28 U.S. Code, Section 1257(3).*

CONSTITUTIONAL PROVISIONS INVOLVED

I

Amendment V. — Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

II

Amendment XIV. — Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

STATEMENT OF THE CASE

On July 6, 1976, the Florida Supreme Court reversed the conviction of DELBERT L. TIBBS, for murder and rape and ordered a new trial. The Court held that the circumstances indicated that except for testimony of victim, not one shred of evidence was developed to place Defendant in area at any time, that no trace was ever found of the truck which victim stated was driven by Defendant when she and other victim wer picked up and taken to scene of crime, that no gun or car keys were found in Defendant's possession, at scene of crime or elsewhere, and that no evidence was introduced to cast doubt on Defendant's veracity. This considered with facts that several features of victims' testimony cast doubt on her believability and that the Defendant cooperated fully with officers, was insufficient to establish Defendant as perpetrator of crimes.

The Court in *Tibbs* v. *State*, *supra*, [Appendix 38 said:

"(6) Several features of Nadeaus' testimony, when considered with other evidence in the record independently established and uncontroverted cast doubt on her believability. For one, despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs' features and characteristics into her mind,

> all independent evidence of the events indicates that the crimes occurred after nightfall. For another, her admitted use of marijuana throughout the day and immediately prior to the crimes casts doubt on her identification of Tibbs. Thirdly, the manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than would have been possible with multiple photographs of one person.
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial."

Subsequent to the reversal in 1976, and prior to trial the Circuit Court found that retrial violates the double jeopardy clause of the United States Constitution, based upon *Burke* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19, (1978), and the State Appealled.

In the *State* v. *Tibbs*, 370, So.2d 386 (Fla. 2d DCA 1979), the Second District Court of Appeal held that the prior appellate reversal was based on weight rather than legal insufficiency of the evidence.

On Certiorari the Florida Supreme Court held that as a ground for appellate reversal the rule that evidence is technically sufficient but its weight is so tenuous or unsubstantial as to require new trial in interest of justice would be eliminated from the State law. However, they held that in this particular case, the double jeopardy clause was not violated by ordering a new trial.

Petition for Writ of Certiorari was filed and this Court granted the petition on November 2nd, 1981.

SUMMARY OF ARGUMENT

The main issue in this case is whether or not Delbert L. Tibbs, the Petitioner, can be re-tried after the Florida Supreme Court in *Tibbs* v. *State*. 337 So2d 788, reversed for a new trial.

The reversal was not based in any technical grounds, in fact it was stipulated that there was no technical grounds for reversal as stated in Judge Schoonover order (A-8).

Both the 5th and 14th Amendments to the U.S. Constitution are involved in that the double jeopardy clause of the U.S. Constitution under the due process clause has been extended to the states.

The original *Tibbs* case *supra,* was decided prior to *Burks* v. *United States,* 437 US 1 (1978) and *Greene* v. *Massey,* 437 US 19 (1978). *Burks* held that double jeopardy clause prohibits retrial where an appellate court reverses a conviction on the grounds that the evidence is insufficient, and *Greene* extended the principal to the states.

There is no question that Tibbs was reversed because of the evidence at the trial level. The Supreme Court of the State of Florida, extensively reviewed the evidence and found that:

> "Rather than risk the very real possibility that Tibbs had nothing to do with these crimes we reverse his conviction and remand for a new trial."

In the *State* v. *Tibbs,* 370 So. 2d 386 (Fla. 2d DCA 1979) the Second District Court of Appeal held that the prior appellate reversal was based on weight rather than legal insufficiency of the evidence.

There is no question as to the factual basis of the reverse rather than technical basis. What seems to be at issue is an interpretation of what is weight and what is sufficient evidence. The Supreme Court of Florida had a great deal of difficulty with the problem.

The original decision in the Florida Supreme Court, (A-34) was rendered by Justices Sundberg, Hatchett, Boyd and England. This was before *Burks* and *Greene, supra*. In the present opinion (A-11), Justices Boyd, England and Sundberg all dissent from the majority opinion. Justice Hatchett is no longer with the Court. The majority found that double jeopardy did not apply, since the original decision was based on weight rather than insufficiency of the evidence. The judges who are all part of the original majority, all dissented and would have ordered Delbert Tibbs free. (A-11).

Delbert Tibbs was convicted and his appeal was in large part based on that the totality of the evidence at trial was insufficient to place him at or near the scene of the murder and rape at the time they occurred, or to establish his identity as the perpetrator beyond all reasonable doubt (A-35).

The Court even quoting another case as the law in Florida, said:

> "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt."

This quote is one of the reasons that convinced Judge Schoonover that the Florida Supreme Court reversed because of insufficient evidence as set out in his order (A-9).

It is clear that this is a matter of insufficient evidence, since the extensive review of the Court was on the evidence. The reason for reversal was because of lack of evidence and a new trial would allow the State to present the same evidence before a different jury. Delbert Tibbs would be forced to go through the expense and tremendous emotional trauma of another ordeal by trial.

This is the precise reason that the double jeopardy clause was created and why Delbert Tibbs should not be retried.

ARGUMENT

The essential point is whether or not the law set forth in *Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19 (1978), was followed by the Florida Supreme Court in *Tibbs* v. *State*, 397 So2d 1120, June 3rd, 1981.

The original reversal by the Florida Supreme Court, *Tibbs* v. *State*, 337 So2d 788, was based on extensive review of the evidence at Page 790(A-36).

> "In this case, we find the following infirmities in the evidence establishing Tibbs as the perpetrator of these crimes:
>
> (1) Except for the testimony of Nadeau, not one shred of evidence was developed to place Tibbs in the Ft. Myers area at any time, let alone on or near February 3, 1971, the date of the crimes. Admittedly, Tibbs was not a public or social figure who would have made acquaintances or attracted attention, but with the publicity attending the crimes and the discovery methods available to the state, surely someone might have been found who could (at least tentatively) have identified Tibbs as having come to Ft. Myers, eaten in Ft. Myers, passed through Ft. Myers, or at least been seen walking or riding in Ft. Myers. No such person was brought forward, and only Cynthia Nadeau's testimony puts this man in that area of Florida. In contrast, undisputed evidence established Tibb's presence in Daytona Beach on the night of February 1, and the morning of February 2, in Leesburg on February 6, and Ocala on February 7. Except Nadeau's testimony, there is no evidence to place Tibbs in the southwest corner of the state during this five day interval.
>
> (2) No trace was ever found of the truck which Nadeau stated was driven by Tibbs when she and Milroy were picked up in Ft. Myers and taken to the scene of the crimes. Despite her specific testimony as to the color of the truck, its type and its special characteristics (no right door handle, rounded hood, blinking oil light), and the additional fact that her description was given to the police

within an hour of Milroy's death and her alleged rape, the police were unable to locate any vehicle like the one she described despite an exhaustive car and helicopter search of the area. This fact can be evaluated against the uncontroverted evidence that Tibbs was on the other side of Florida, in Daytona Beach, the morning of the day before the crimes and at that time possessed no vehicle for his use.

(3) No gun or car keys were ever found in Tibb's possession, at the scene of the crime, or elsewhere. When Tibbs was stopped by police officers in Florida and Mississippi (February 6 in Leesburg, February 7 in Ocala, and March 13 in Clarksdale, Mississippi) he was afoot, and there was no evidence that he had either owned or operated a motor vehicle.

(4) On the three occasions when Tibbs was stopped by police on the basis of the description issued by Nadeau, he cooperated fully with the officers by providing all information and identification they requested, by allowing himself to be photographed, and on the last occasion by waiving extradition in Mississippi to voluntarily return to Florida to face rape and murder charges in Ft. Meyers.

(5) No evidence was introduced which casts doubts on Tibb's veracity. He did not have a previous criminal record and he has never been arrested, except possibly for a traffic violation. Evidence was introduced from people in his home town, including a minister and elected state officials, that he was a law-abiding citizen.

(6) Several features of Nadeau's testimony, when considered with other evidence in the record independently established and uncontroverted, cast doubt on her believability. For one, despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs' features and characteristics into her mind, all independent evidence of the events indicates that the crimes occurred after nightfall. For another, her admitted use of marijuana throughout the day and immediately prior to the crimes casts doubt on her identification of Tibbs. Thirdly, the manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers

from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than should have been possible with multiple photographs of more than one person.

(8) We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legislature has directed that we review the "entire record." Our obligation now is no less than it was when Odie McNeil was sentenced to life imprisonment in 1932 and this Court said:

> "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt. This is especially true in a case where life imprisonment is the penalty imposed. *Heath* v. *State*, [97 Fla. 330, 120 So.846] *supra*. And where the evidence of identity of the accused as being the guilty party is not satisfactory to the appellate court, a new trial will be granted. *Nims* v. *State*, [70 Fla. 530, 70 So. 565] *supra*.
>
> In this case the sole testimony identifying the defendant McNeil as a participant in the robbery was given by the witness Rahming.
>
> While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also the rule that the evidence relied on to have this effect must be substantial in character.
>
> When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an

> accused as a participant in a crime of which he has been found guilty." *McNeil* v. *State*, 104 Fla. 360, 139 So.791, 792 (1932).
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial.

It is apparent from this review that there is no other reason for reversal other than to use the Court's phrase:

> ". . . . infirmities in the evidence establishing Tibbs as the perpetrator of these crimes."

Before Tibbs could be retried *Burks* and *Greene, supra,* was decided by this Court. In accordance with that decision, a Motion to Dismiss was filed and granted by Judge Schoonover on July 27, 1978. In his Order granting his dismissal, Judge Schoonover said at (A-7):

> "Prior to June 14, 1978, double jeopardy did not apply when a case was reversed on the basis of the insufficiency of evidence, if the Defendant had requested a new trial. *Greene* v. *Massey*, 546 F.2d 51 (1977). *Tibbs* v. *State of Florida*, 432 F. Supp. 1045 (1977). *Sosa and Greene* v. *State*, 215 So.2d 736 (Fla. 1968).
>
> *However*, on June 14, 1978, the United States Supreme Court decided the cases of *Greene* v. *Massey*, (76-6617), and *Burks* v. *United States*, (76-6528). In those cases, the Supreme Court held that the double jeopardy clause precludes a second trial once a reviewing court had determined that the evidence introduced at trial was insufficient to sustain the jury's verdict. The court further held that the principle applied even if the Defendant had moved for a new trial, as was done by Mr. Tibbs in this case.
>
> The State has stipulated that this case was not reversed by the Supreme Court of Florida because of any trial error. If this had been the case, the result reached here would have been different.

The State contends that the Supreme Court in this case reversed and ordered a new trial on the grounds of the weight of the evidence, and, therefore, the recent rulings do not apply.

It would appear that the State could find support for this argument in a case involving the same Mr. Greene. In reversing Mr. Greene's original conviction, the Florida Supreme Court stated: "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that defendants committed murder in the first degree, and that the interests of justice require a new trial." *Sosa and Greene* v. *State*, 215 So2d 736, 737 (Fla. 1968). Subsequently, Mr. Greene advanced the double jeopardy argument to the Florida Appelate Courts. *Sosa and Greene* v. *Maxwell*, 234 So.2d 690 (Fla. DCA 2d 1970). In that case, based upon the above-mentioned wording, the Court stated that Greene and Sosa had not made a clear showing that the reversal by the Florida Supreme Court was based on the insufficiency of the evidence. They stated that the reversal appeared to be based on a finding that the evidence, though technically sufficient, was so tenuous as to prompt an Appellate Court to exercise its discretion, and in the interests of justice grant a new trial.

However, that wording of the Florida Supreme Court, was considered by the United States Supreme Court in it's June 14, 1978, ruling on the Greene case, and they found based on that wording, that the reversal had been because of insufficient evidence.

A review of the statements made by the Florida Supreme Court in this case wherein the Court stated that: "Tibbs' principal contention to this Court is that the totality of evidence at trial was insufficient to place him at or near the scene of the murder and rape at the time they occurred, or to establish his identity as the perpetrator beyond all reasonable doubt." *Tibbs* v. *State*, 337 So.2d 788, 789 (Fla. 1976), and their quote from another case that "Human liberty should not be forfeited by a conviction

> under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt." *Id.* at 791, force this Court to believe, and so find, that the Florida Supreme Court reversed this case on the basis of insufficient evidence. If they had intended otherwise, they could have removed the above-mentioned language from their opinion, and given a different basis for their ruling.
>
> Additionally, in remanding the instant case back to this Court from the Federal Court, prior to June 14, 1978, District Court Judge Krentzman, relying on the Greene case as it stood before certiorari was granted by the United States Supreme Court, said: "The Florida Supreme Court could properly remand petitioner for new trial despite its finding that there was insufficient evidence in the record of petitioner's first trial to sustain his conviction." *Tibbs* v. *State of Florida*, 432 F.Supp. 1045, 1047 (1977).

Judge Schoonover set out very well a summary of what the original Tibbs decision meant. The Court in the original Tibbs case, as set out prior, went into a very detailed analysis of the insufficiency of the evidence. The Court in *Tibbs* v. *State*, 397 So2d 1120, the case now under review, evidently set out a distinction between weight and sufficiency, a distinction that is almost impossible to define. A pound coffee can weighing a half pound has insufficient weight or the weight is not great enough. Weight and sufficiency are synonymous, and the distinction as set up does not make any sense, especially in this case, and the Court is drawing extremely fine lines.

Justice Sundberg in his dissent from the present decision at (A-24) said:

> "Although the majority concedes that it is difficult if not impossible to characterize and thereby categorize the prior decisions of this Court and the District Courts of Appeal as to whether a reversal was based on "weight" as opposed to "sufficiency," nevertheless, our prior decision in this cause is dissected to conclude that the reversal was, in fact, based upon the weight and not the sufficiency of the evidence. Two aspects of this trouble me.

First, not only would such an act by the Court in our first decision have been "novel" since there is no legal justification for such a procedure, but it would also have been unlawful. Regardless of how incorrect the conclusion in our first decision may now be perceived, nonetheless, our only authority to reverse the conviction based on the evidence, as an Appellate Court, was due to its insufficiency. We have consistently recognized that Appellate Courts may not reweigh evidence. They may only assess its sufficiency. See *Herzog* v. *Herzog*, 346 So.2d 56 (Fla. 1977); *Shaw* v. *Shaw*, 334 So.2d 13 (Fla. 1976); *Westerman* v. *Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972). So now to characterize our former action as an erroneous reweighing of the evidence seems improvident at best.

Furthermore, I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed — yes or no, why or why not. The answer is ineluctably affirmative.

The reason requires an examination of double jeopardy principles. Whether the first trial results in an acquittal, conviction or no verdict, a major purpose of protection against double jeopardy is to prevent the imposition of multiple trials upon the defendant. *See Price* v. *Georgia*, 398 U.S. 323, 331 (1970). Because of its superior resources, the state must not be allowed to reprosecute the defendant for the same offense until it achieves the desired conviction. *See United States* v. *Scott*, 437 U.S. 82, 87 (1978). The double jeopardy clause is aimed at checking prosecutorial discretion and at preventing abuse of criminal prosecution used as a means of government oppression. These purposes are well summarized in the oft-quoted passage from *Green* v. *United States*, 355 U.S. 184, 187-88 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an

> individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enchancing the possibility that even though innocent he may be found guilty.

Central to the prohibition against double jeopardy is the barrier forbidding a "second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (footnote omitted). The state is not allowed a "second crack" at convicting a defendant when its first effort fell short of the mark because it somehow failed to present the proper evidence. *See Swisher* v. *Brady*, 438 U.S. 204, 216 (1978). This is the rationale underlying *Burks* which recognizes that an appellate reversal for lack of evidence is tantamount to an acquittal. This is because such a decision by an appellate court constitutes "a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15.

Burks takes great care to distinguish the double jeopardy implications of appellate reversals due to trial error and those due to evidentiary insufficiency. Reversal and retrial because of trial error does not contravene double jeopardy principles because such a reversal implies nothing about the guilt or innocence of the defendant but rather "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." *Id.* at 15. The distinction, therefore, is between reversal for a procedural trial error and reversal for a substantive lack of evidence to support the verdict.

The distinction made in *Burks* parallels that made in *United States* v. *Scott*, 437 U.S. 82 (1978), decided in the same term as *Burks*. In *Scott*, the Supreme Court held that double jeopardy protection could not be invoked by a defendant who had obtained dismissal of two counts of narcotics charges because of prejudice due to preindictment delay by the prosecution. The dismissal had been

granted pursuant to a legal defense, not pursuant to a factual defense. The Supreme Court thus developed a definition of acquittal as "the ruling of the judge, whatever its label, [which] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged. '*Martin Linen* [430 U.S. 564] . . . at 571" *Scott*, 437 U.S. at 97. Scott had obtained a dismissal because of a legal and not a factual deficiency in the government's case and was therefore not entitled to double jeopardy protection.

Our task, then, is to decide whether this Court's prior reversal of Tibbs' conviction is more closely related to trial error or evidentiary insufficiency, and whether the reversal is based upon legal defense or a factual defense. The problem is complicated by the nefarious creation in Florida case law of a theoretical third reason for appellate reversal, *viz.*, lack of evidentiary weight. Though this Court has never specifically recognized this reason for appellate reversals, at least two district court of appeal opinions have attempted to establish this as a basis for reversal. In *Sosa* v. *Maxwell*, 234 So.2d 690 (Fla. 2d DCA), *cert. denied*, 240 So.2d 640 (Fla. 1970), *cert. denied*, 402 U.S. 951 (1971), the district court sought to characterize this Court's prior reversal of a murder conviction as being based on lack of evidentiary weight. The district court attempted to avoid the growing trend it recognized in other states, which would not allow retrial after reversal based on evidentiary insufficiency. *Id.* at 692. Inherent in *Sosa* is the notion that the distinction the district court sought to establish between sufficiency and weight of the evidence had some meaning in terms of the applicability of the double jeopardy clause. Although the present majority rightly rejects the district court's characterization in *Sosa*, it paradoxically seeks to imply that the distinction used there is possessed of some significant meaning in terms of double jeopardy protection. We explicitly rejected this in *State* v. *Smith*, 249 So.2d 16 (Fla. 1971), when the same district court again attempted to foist this ground for appellate reversal into Florida's case law. The majority properly recognized the weak support

for this distinction and relegates it to history as an anomaly. The rejection of this third category of appellate reversal is supported by our recent decision in *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979), which firmly rejected the state's proffer of this base as a means of avoiding double jeopardy application when we had reversed a murder conviction because the circumstantial evidence failed to rebut a hypothesis of innocence.

Both opinions in *McArthur* and the present majority note that the United States Supreme Court did not directly address the issue with which we are faced when it decided *Green* v. *Massey*, 437 U.S. at 26 n.10, where the Supreme Court declined to express a view on our specific problems. This lack of expressed opinion is the only significance I can find underlying the sufficiency-weight distinction which the majority develops, at least when the distinction is made at the appellate level. Yet the Supreme Court's refusal to decide whether the double jeopardy protections are implicated under such a characterization does not necessarily imply that the principles of *Burks* and *Greene* are ipso facto inapplicable to our case. The issue is merely undecided, not uncontrolled by these two cases.

Having surmised that the sufficiency-weight distinction is useless in resolving the case before us, I return to the problem of aligning Tibbs' case on the side of either trial error or evidentiary insufficiency, or alternatively on the side of either a legal defense or a factual defense. There can be no doubt that our original reversal of Tibbs' conviction was due to this Court's perception that the state had failed to establish the identity of Tibbs as the perpetrator of the murder and rape. This surely belongs in the category of evidentiary insufficiency and not trial error. Likewise, under the *Scott* distinction, the basis of the reversal was one going to a factual element of the case, identity, and was not a technical legal problem such as a preindictment delay by the prosecution. We were not concerned that Tibbs did not receive a procedurally fair trial; we were concerned with the insufficiency of a factual showing of identification. Under either the *Burks* or *Scott* distinction, Tibbs' case is therefore one which deserves protection from double jeopardy."

Justice Boyd, who in the original Tibbs case felt that there wasn't sufficient evidence, also said at (A-30):

> "When petitioner originally appealed his conviction to this Court, I concurred in the judgment of the Court reversing and remanding for a new trial. *Tibbs* v. *State*, 337 So.2d 788, 792 (Fla. 1976) (Boyd, J., concurring specially). My concurring opinion reveals my view, which I still hold, that when an appellate court judges the sufficiency of evidence to support a criminal conviction, it does so upon the whole record, and will therefore not always be bound by such general rules of sufficiency as the one pertaining to the uncorroborated testimony of a rape victim, stated in *Thomas* v. *State*, 167 So.2d 309 (Fla. 1964). While such a rule of evidentiary sufficiency provides that the kind of evidence in question (e.g., uncorroborated identification of rape victim) may, as a matter of law, be sufficient, it does not preclude the appellate court from inquiring, upon the whole record, whether the verdict is supported by competent, substantial evidence. The inquiry is whether a jury of reasonable people could conceivably conclude from the evidence admitted that guilt was proved beyond a reasonable doubt. *See, e.g., Griffis* v. *Hill*, 230 So.2d 143 (Fla. 1970). On the original *Tibbs* appeal, I also expressed my reluctance, since the conviction in my view was being reversed because of the insufficiency of the evidence, to concur in the Court's mandate allowing a new trial.
>
> In *McArthur* v. *State*, 351 So.2d 972 (Fla. 1977), where it was clearer that the ground of reversal was evidentiary insufficiency, I dissented from that portion of the Court's decison holding that a new trial was permissible. *Id.* at 978 (Boyd, J., concurring in part and dissenting in part). When this Court later denied Nadean McArthur's petition to prohibit her retrial, *McArthur* v. *Nourse*, 358 So.2d 132 (Fla. 1978) (prohibition denied without option), the United States Supreme Court granted certiorari, vacated the order, and remanded for reconsideration in light of *Greene* v. *Massey*, 437 U.S. 19 (1978) and *Burks* v. *United States*, 437 U.S. 1 (1978). When this Court reconsidered the case, it concluded that the Double Jeopardy Clause would not

allow another trial. *McArthur* v. *Nourse*, 369 So.2d 578 (Fla. 1979).

Greene and *Burks* now make clear that when an appellate court finds that a judgment cannot stand because the state has failed to carry its burden of proof, it is a violation of the Fifth and Fourteenth Amendments to allow the state to have another chance.

I disagree, moreover, with the majority opinion's statement that "the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*." The reason that courts, in many of the cases cited by the majority, were so careful to characterize their decisions as reversals for lack of weight rather than legal insufficiency, was because of an understanding that Double Jeopardy disallowed retrial after reversal for insufficiency *See, e.g., Sapir* v. *United States*, 348 U.S. 373 (1955); *Smith* v. *State*, 239 So.2d 284 (Fla. 2d DCA 1970).

The Double Jeopardy Clause was written to prevent precisely what the Court's decision today allows — successive attempts by the state to prove its accusations. This Court's holding that the state failed to carry its burden in petitioner's trial, and that the conviction therefore could not stand, should now be seen as the equivalent of a judgment of acquittal, and be afforded the same finality as a jury verdict to that effect. Petitioner should be forever discharged from the accusations made against him."

Justice Boyd also raises the fact that in addition to the double jeopardy principle, the principle of *res judicata* applies, since at a new trial using the same evidence, assuming a conviction, the Supreme Court would have to, under the reasoning of the current case, find the evidence sufficient since it is no longer using the weight theory. Under both, double jeopardy and *res judicata*, Delbert Tibbs should not be re-tried.

The dissenting judges in the present case, were part of the majority in the original Tibbs reversal. Both, Justices Sundberg

and Boyd have very eloquently set out their reasons for believing that the original reversal was based on insufficiency of the evidence. This would clearly bar a retrial under the double jeopardy clause. Justice England also agreed that Tibbs should not be re-tried in the interest of justice (A-30). Justice Hatchett who was part of the original majority is no longer on the court. Since three of the original majority are now in the minority in the interpretation of what the original opinion meant, it is only justice to free Delbert Tibbs.

CONCLUSION

The re-trial of Delbert Tibbs is barred by the Double Jeopardy Clause of the U.S. Constitution, and therefore, the case against Delbert Tibbs should be dismissed and Delbert should be forever discharged from the accusations made against him. The Supreme Court of the State of Florida, should be instructed to order such discharge.

Respectfully submitted,

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Respondent's Brief

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Case No. 81-5114

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DELBERT LEE TIBBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY PRECLUDES RETRIAL OF THE PETITIONER WHERE THE APPELLATE COURT ACTING AS A "THIRTEENTH JUROR" ASSESSED THE CREDIBILITY OF THE WITNESSES AND REWEIGHED THE EVIDENCE CONCLUDING THAT ALTHOUGH THE EVIDENCE WAS SUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICTS THE PETITIONER SHOULD BE AFFORDED A NEW TRIAL IN THE INTEREST OF JUSTICE?

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BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Florida upon which review is sought is reported as *Tibbs v. State of Florida*, 397 So.2d 1120 (Fla. 1981) (J.A. 11-34).

The original opinion of the Florida Supreme Court on direct appeal and wherein the Court reversed the conviction and remanded for a new trial is reported as *Tibbs v. State of Florida*, 337 So.2d 788 (Fla. 1976) (J.A. 34-51). The opinion of the Second District Court of Appeal of the State of Florida in and for the Second District, wherein the appellate court reversed the trial court's order granting, on re-trial, petitioner's Motion to Dismiss the Indictment is reported as *State of Florida v. Tibbs*, 370 So.2d 386 (Fla.2d DCA 1979) (J.A. 51-57).

JURISDICTIONAL STATEMENT

The opinion *Tibbs v. State of Florida*, 397 So.2d 1120 (Fla. 1981), filed April 9, 1981, Rehearing denied June 3, 1981, is presented for review. The Petition for Certiorari was filed within sixty (60) days of the denial of

the Rehearing in accordance with Rule 20(1) of the Rules of the Supreme Court of the United States. Petitioner contends, in accordance with Rule 17(b) of the Rules of the Supreme Court of the United States, that the Supreme Court of the State of Florida has decided an important question of United States Constitutional law in a way which conflicts with prior decisions of this Court. Petitioner specifically asserts that the State Court decision denies him his right and privilege against being twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments. Jurisdiction is invoked under 28 U.S.C.A., Supp. 1970, §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

United States Constitution, Amendment V:

"...nor shall any person be

> subject for the same offense to be twice put in jeopardy of life or limits..."

STATEMENT OF THE CASE AND FACTS

Petitioner was charged in a three count indictment with the rape of Cynthia Nadeau, the premeditated murder of Terry Milroy and the crime of felony murder for killing Milroy while raping Nadeau. A twelve person jury evaluated the evidence, including the credibility of the witnesses and found petitioner guilty of first degree murder and rape. A death sentence was recommended by the jury for murder, and the trial judge imposed the death penalty for the crime. Petitioner was also sentenced to life imprisonment for the rape. Petitioner prosecuted a direct appeal to the Florida Supreme Court to review the convictions.

The Florida Supreme Court on direct appeal, *Tibbs v. State*, 337 So.2d

788 (Fla. 1976) (J.A. 34-51) set forth the relevant facts of the crime as follows:

> The relevant facts of the alleged crime, as brought out on trial, were these. Nadeau and Milroy were hitchhiking to Marathon from St. Petersburg, when they were picked up in Fort Myers by a man alleged to be driving a green truck with a rounded hood, black vinyl seats, no door handle, and an oil light that blinked on and off. This man drove into a field, stopped the truck, got out of the truck with Milroy and requested that Milroy give him a hand. After a minute or so passed, Nadeau got out of the truck and went around to the back of the truck where the driver was holding a gun on Milroy. As he held the gun on Milroy, he commanded Nadeau to undress. He then shot Milroy and walked over to where Milroy lay. Milroy pleaded with the driver not to kill him, but the man shot him again, inflicting the fatal wound. The driver then proceeded to rape Nadeau. Thereafter, she was ordered to dress and get back in the truck. Upon reaching the highway, she was ordered

> to get out and walk in front of the truck. She left the truck, but was able to run and successfully escape.
>
> *Id* at 789 (J.A. at 34,35)

The surviving victim unequivocally identified petitioner as the perpetrator of the offenses (J.A. 57-76). The victim's testimony was corroborated by the testimony of Tibbs' cellmate to the effect that Tibbs confessed to the commission of the crimes (R. Florida Supreme Court #47258, pages 423-427).

In reaching disposition of the cause, the court recognized that under Florida law it was the court's "obligation to review a conviction for which the death sentence has been imposed to determine if the interests of justice require a new trial." *Id* at 790 (J.A. at 35). The court in reversing and remanding for a new trial found that there were several

"infirmities" in the evidence and that several features of the victim's testimony "cast doubt on her believability." *Id* at 791 (J.A. at 36). The convictions were reversed and the cause remanded for a new trial.

Subsequent to the reversal, the State initiated retrial. Petitioner moved to dismiss the indictment and the trial judge found that in light of *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978) that retrial would violate the Double Jeopardy Clause of the Fifth Amendment. The State appealed to the Second District Court of Appeals and the Order granting the Motion to Dismiss was reversed in *State of Florida v. Tibbs*, 370 So.2d 386 (Fla.2d DCA 1979) (J.A. 51-57). The District Court of Appeals determined that the Florida Supreme Court's previous reversal was

not based on a legal insufficiency of the evidence but "rather was bottomed upon the majority's view that the evidence was inherently weak and seriously contradicted, and that Tibbs should be accorded the opportunity to be tried before another jury in the interests of justice. *Id* at 388 (J.A. at 55). The Court accordingly found that retrial would not violate double jeopardy and remanded to the trial court for further proceedings.

Petitioner thereafter petitioned the Florida Supreme Court for a Writ of Certiorari. Petitioner asked the Florida Supreme Court to rule that its previous reversal of his original conviction was based on the legal insufficiency of the evidence. The Court declined to do so and held that its previous opinion "was one of those rare instances in which reversal was based on evidentiary

weight." *Tibbs v. State*, 397 So.2d 1120 (J.A. at 21,22). The decision of the Second District Court of Appeal was affirmed.

SUMMARY OF ARGUMENT

Petitioner's convictions were reversed by the Florida Supreme Court "in the interest of justice," despite the fact that the evidence was legally sufficient to support the verdicts. The Florida Supreme Court specifically found that the reversals were not predicated on a finding that the evidence was insufficient to sustain the verdicts. Rather the court acting as a "thirteenth juror" assessed the credibility of the witnesses and reweighed the evidence in reversing Tibb's convictions.

Retrial is not barred by *Burks v. United States*, 437 U.S. 1 (1978), where the evidence is found to be

legally sufficient to support the verdicts. Moreover, the policy and reasoning underlying the *Burks* decision do not extend to the situation where a new trial is granted "in the interest of justice", upon reweighing the evidence. The Constitutional prohibition against double jeopardy simply does not preclude retrial where the appellate court acting as a "thirteenth juror" has assessed the credibility of the witnesses and reweighed the evidence, reversing petitioner's convictions despite the fact that the evidence was legally sufficient to support the verdicts. In this situation it is petitioner, and not the state, who gets the proverbial "second bite of the apple."

ARGUMENT

I. WHETHER THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY PRECLUDES RETRIAL OF THE PETITIONER WHERE THE APPELLATE COURT ACTING AS A "THIRTEENTH JUROR" ASSESSED THE CREDIBILITY OF THE WITNESSES AND REWEIGHED THE EVIDENCE CONCLUDING THAT ALTHOUGH THE EVIDENCE WAS SUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICTS THE PETITIONER SHOULD BE AFFORDED A NEW TRIAL IN THE INTEREST OF JUSTICE?

A. PETITIONER'S CONVICTIONS WERE REVERSED BY THE FLORIDA SUPREME COURT IN THE INTEREST OF JUSTICE; THE FLORIDA SUPREME COURT SPECIFICALLY FOUND THAT THE REVERSALS WERE NOT PREDICATED ON A FINDING THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICTS.

Initially Petitioner contends that the reversals of his convictions were based on a finding that the evidence was insufficient as a matter of law to support the verdicts of guilty.[1] How-

---

1/ Petitioner cites to the language of the Florida Supreme Court in the initial opinion, *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976) (J.A. at 38),

ever, the Florida Supreme Court has unequivocally opined on the nature of its prior reversal. In *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981) (J.A. 11-34) the Florida Supreme Court recognized that:

> Tibbs' conviction rested primarily on the uncorroborated testimony of the rape victim, Cynthia Nadeau. *Although this testimony alone was legally sufficient to support Tibbs' conviction under Florida law, Thomas v. State*, 167 So.2d 309 (Fla. 1964), we reversed his conviction due to a number of "infirmities in the evidence establishing Tibbs as the perpetrator" of the crime. Among these infirmities were

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wherein the Court quoted from an earlier case, *MacNeil v. State*, 104 Fla. 360, 139 So. 791 (1932): "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of guilt of the accused beyond a reasonable doubt." Although indeed this statement characterizes a finding of insufficiency as a matter of law, the quotation is taken out of context of the entire opinion.

> several aspects of Nadeau's testimony which cast serious doubt on her believability. In effect, we reweighed the evidence supporting Tibbs' conviction and remanded for a new trial.
>
> *Id* at 1126 (J.A. at 21,22) *(emphasis added)*

The Florida Supreme Court clearly stated that the evidence presented by the State at Tibbs' trial was sufficient under Florida law to support the jury verdicts and that their prior reversal was "one of those rare instances in which reversal was based on evidentiary weight" *Id* at 1126 (J.A. 21,22).

The court further stated:

> Only by stretching the point, however, could we possibly use an "insufficiency" analysis to characterize our previous reversal of Tibbs' convictions.
>
> *Id* at 1126 (J.A. at 22)

The Florida Supreme Court went on to

specifically state that "we cannot fairly conclude from our original opinion that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency." *Id* at 1127 (J.A. at 22,23).

Thus, the Supreme Court of the State of Florida has reviewed their prior decision and determined that Tibbs' previous convictions were reversed in the interest of justice upon reweighing the evidence and determining the credibility of the witnesses as opposed to a reversal because the evidence was insufficient to support the verdicts. It is axiomatic that questions of state law should be decided by the courts of that particular state. Whether or not the evidence was sufficient under Florida law to support the verdicts is a question appropriately answered by the Florida Supreme Court. The Florida Court has made it abundantly

clear that the evidence adduced at Tibbs' trial was indeed sufficient under Florida law to support the verdicts; such a decision on State law is binding upon this Honorable Court.

B. RETRIAL IS NOT BARRED BY *BURKS v. UNITED STATES*, 437 U.S. 1 (1978), WHERE THE EVIDENCE IS FOUND TO BE LEGALLY SUFFICIENT TO SUPPORT THE VERDICTS.

As early as 1896 this Court has held that the prohibition against double jeopardy is not violated upon retrial of a defendant who had been convicted in an earlier proceeding and chose to prosecute an appeal. *United States v. Ball*, 163 U.S. 662 (1895). Recently, in *United States v. DiFrancesco*, ____U.S.____66 L.Ed.2d 328 this Court emphasized:

> Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "im-

> poses no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside" (emphasis in original). *North Carolina v. Pearce*, 395 U.S., at 720, 23 L.Ed.2d 656, 89 S.Ct. 2072. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo*, 377 U.S. at 466, 12 L.Ed.2d 448, 84 S.Ct. 1587. "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott*, 437 U.S. at 91, 57 L.Ed.2d 65, 98 S.Ct. 2187.

In *Burks v. United States*, supra, this Court balanced the fundamental concept that a defendant who has been

acquitted may not be retried for the same offense, against the historic principle that a defendant waives his right to plead former jeopardy on retrial following a successful appeal from a previous conviction. In *Burks* the court rejected the waiver theory and held that the double jeopardy clause bars retrial where an appellate court has determined that the evidence introduced at trial was insufficient as a matter of law to sustain the verdicts; the clause bars retrial notwithstanding the fact that the defendant sought a new trial as one of his appellate remedies.[2] The holding

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2/ By so holding this Court overruled its prior decisions which provided that a court of appeals could order a new trial after a conviction has been reversed due to evidentiary insufficiency if a motion for a new trial was made in the trial court. See *Forman v. United States*, 361 U.S. 416 (1960); *Sapier v. United States*, 348 U.S. 373 (1955); *Bryan v. United States*, 338 U.S. 552 (1950).

in *Burks* was based on this Court's observation that such an appellate reversal is tantamount to holding that a judgment of acquittal should have been entered by the trial court:[3]

> ...[m]oreover such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal - no matter how erroneous its decision - it is difficult to conceive how society has any greater interest in retrying a defendant when, on review it is determined as a matter of law that the jury could not properly have returned a verdict of guilty.
>
> (*Id* at 16) *(emphasis supplied)*

3/ The *Burks* court specifically held that "[t]hat the appellate decision unmistakenly meant that the district court erred in failing to grant a judgment of acquittal." *Burks v. United States*, supra, at pg. 10.

This Court reasoned that if double jeopardy did not bar retrial in such cases "a purely arbitrary distinction" would result between defendants subject to an appellate reversal essentially finding that the trial court erred in denying a motion for judgment of acquittal and those defendants who "would enjoy the benefit of a correct decision" by the trial court. *Id* at pg. 11.

Indeed the holding of *Burks* was a narrow one - that the Double Jeopardy Clause bars a retrial where the evidence at the first trial was insufficient *under the standard of federal appellate review* to support the jury verdict:

> The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case

should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [citations omitted]

The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. [citations omitted]

Obviously a federal appellate court applies no higher a standard rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. [citations omitted]

While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, *it is apparent that such a*

> *decision will be confined to cases where the prosecution's failure is clear.* [footnote omitted]
>
> 437 U.S. at 16 (*emphasis added*).

The *Burks* Court thus concluded that since a reviewing court which finds the evidence insufficient as a matter of law, does no more than hold that the defendant was entitled to an acquittal in the trial court in the first instance, the decision of the reviewing court should have the same effect for purposes of the Double Jeopardy Clause as an acquittal. The Court thus recognized that the appellate decision meant that the trial court had erred in failing to grant a judgment of acquittal and since, had the trial court properly granted the judgment of acquittal retrial would have been barred, no different result should attach to the appellate court's decision.

This Court further defined what constitutes the meaning of "evidentiary insufficiency" within the meaning of *Burks* in *Hudson v. Louisiana*, ___U.S. ____,67 L.Ed.2d 30 (1981). In *Hudson* this Court rejected the State of Louisiana's position that *Burks* only bars retrial if the Court reviewing the evidence determines that there was *no* evidence to support the verdict and held that "our decision in *Burks* controls the case, for it is clear that petitioner moved for a new trial on the ground that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground."[4] *Hudson v. Louisiana*,

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4/ The *Hudson* Court noted that the trial judge, after reviewing the evidence put to the jurors, found that "there was no evidence, certainly no evidence beyond a reasonable doubt, to sustain the verdict" and that the Louisiana Supreme Court held that the trial judge had indeed granted the new trial on

supra, at 33. This Court held that as the trial judge granted the petitioner's Motion for a New Trial because the "State had failed to prove it's case as a matter of law", *Burks* precluded retrial. *Id* at 34.

In the case sub judice the appellate court did not determine that the evidence was insufficient as a matter of law to support the verdicts or that the trial court erred in failing to enter a judgment of acquittal.[5] Moreover, the standard

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the ground that the evidence was legally insufficient.

5/ Petitioner Tibbs moved for a directed verdict of acquittal following the close of the State's case (R.Fla.Sup. Ct. #47258, 612-614). Petitioner also moved for a new trial alleging inter alia, that the jury's verdict was manifestly against the weight of the evidence (R.Fla. Sup.Ct. #47258, 880-948, specifically at 884).

of evidentiary review employed by the Florida Supreme Court in the instant case clearly diverges from the traditional sufficiency of the evidence analysis as employed by the Circuit Court of Appeals in *Burks*. In this case Florida's Second District Court of Appeals was of the view that the Florida Supreme Court granted a new trial "in the interest of justice" even though the evidence was technically sufficient to support a verdict of guilty. See *State v. Tibbs*, 370 So.2d 386 (Fla. 2d DCA 1979) at 388 (J.A. 51-56). The Florida Supreme Court affirmed the decision of the Second District Court of Appeal. *Tibbs v. State*, 397 So.2d 1128 (Fla. 1981) (J.A. 11-33) and specifically found that Tibbs' convictions were *not* reversed on grounds of evidentiary insufficiency. As previously set forth, the Florida Supreme Court expressly found

that "[the] testimony (of the rape victim) alone was legally sufficient to support Tibbs' conviction under Florida law." *Id* at 1126 (J.A. 21). The Court further stated that "only by stretching the point could we possibly use an 'insufficiency' analysis to characterize our previous reversal of Tibbs' convictions" and concluded that "we cannot fairly conclude from our original opinion that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency of the evidence". *Id* at 1127 (J.A. at 22).

It is apparent from the foregoing, that the Florida Supreme Court itself conceded that it had improperly assessed the evidence as a thirteenth juror. The evidence although legally sufficient was reweighed by the Court and petitioner's convictions were reversed despite the existance of evidence sufficient to

support the verdicts of guilty.

In *Hudson v. Louisiana*, supra, this Court stated in footnote five:

> 5. Whether a state trial judge in a jury trial may assess evidence as a "13th juror" is a question of state law. [citations omitted] Justice Tate's concurring opinion for the Louisiana Supreme Court suggests that Louisiana law allows trial judges to act as "13th jurors." We do not decide whether the Double Jeopardy Clause would have barred Louisiana from retrying petitioner if the trial judge had granted a new trial in that capacity, for that is not the case before us. We note, however, that *Burks precludes retrial where the State has failed as a matter of law to prove its case* despite a fair opportunity to do so. Ante, at ___, 67 L.Ed.2d 33. By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, *nothing in Burks precludes retrial in such a case.*
>
> 67 L.Ed. at 34
> *(emphasis added)*

Thus, as Tibbs' convictions were clearly reversed by the appellate court upon a reweighing of the evidence in the capacity of a thirteenth juror, it is clear that *Burks* does not preclude retrial.

C. THE POLICY AND REASONING UNDERLYING THE *BURKS* DECISION DO NOT EXTEND TO A NEW TRIAL ORDER GRANTED IN THE INTEREST OF JUSTICE UPON REWEIGHING THE EVIDENCE.

Moreover, the history of law and policy which underlie the *Burks* decision dictate that the double jeopardy clause does not bar retrial in the instant case. The foundation of the *Burks* decision is that as a verdict or judgment of acquittal is afforded absolute finality in double jeopardy jurisprudence, a finding by the appellate court that the trial court erred in denying a Motion for Judgment of Acquittal must also be

afforded finality.

Clearly, the *Burks* bar to reprosecution is confined to those cases where the State has failed to prove it's case. *Burks*, supra. In *United States v. DiFrancesco*, supra, this Court made it clear that the double jeopardy clause "imposes no limitations whatever on the power to retry a defendant who has succeeded in getting the first conviction set aside" and that the *only* exception to the rule is that "double jeopardy prohibits retrial after a conviction has been reversed because of insufficiency of the evidence" 66 L.Ed.2d at 341,342. Thus, the double jeopardy analysis under *Burks* contemplates an initial unsuccessful prosecution, not a successful one. Here the State had successfully prosecuted the petitioner only to have the Court as a 13th juror grant a new trial.

A new trial ordered by an appellate court acting as a 13th juror is not precluded by the double jeopardy clause as the appellate court when acting in such a capacity neither finds that a judgment of acquittal should have been entered nor that the State failed to prove its case as a matter of law.

In this case Tibbs' convictions were reversed regardless of the fact that the State had met its legal burden of proof. While retrial after a reversal for *insufficiency* of the evidence affords the State the proverbial "second bite of the apple", retrial after a reversal "in the interest of justice" despite sufficient evidence, gives the accused the "second bite of the apple", i.e., the accused, having been convicted on legally sufficient evidence is given the opportunity to put the State to its

proof a second time.

Finally, when the appellate court as a thirteenth juror disagrees with the original twelve jurors, the situation created, is analogous to that of a hung jury. It has been uniformly held that if a jury is unable to agree on a verdict, a retrial of the accused for the same offense by another jury does not violate the double jeopardy provision of the Fifth Amendment. *United States v. Perez*, 9 Wheat 579, 6 L.Ed.2d 165 (1824); *Green v. United States*, 355 U.S. 184 (1957). Likewise here, where the court as a 13th juror is unable to agree with the original twelve jurors, retrial of the accused "in the interest of justice" does not violate the Double Jeopardy Clause.

In *Snyder v. Massachusetts*, 291 U.S. 97, (1934), in the oft quoted opinion of Justice Cardozo, the court

warned:

> "But justice, though due to the accused, is due to the accuser also."
>
> (291 U.S. at 122)

Here, where petitioner has been found guilty of murder by his peers, and where petitioner has been granted a new trial despite the sufficient evidence against him, a great injustice would occur were the State prohibited from retrying petitioner.

CONCLUSION

The Double Jeopardy Clause of the United States Constitution does not preclude retrial of petitioner. This Honorable Court should affirm the decision of the Supreme Court of Florida in *Tibbe v. State*, 397 So.2d 1120 (J.A, at 21,22).

Respectfully submitted,

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No. 81-5114

In the Supreme Court of the United States

OCTOBER TERM, 1981

DELBERT LEE TIBBS, PETITIONER

v.

STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes reprosecution when a conviction is reversed, not because the supporting evidence was legally insufficient, but because the conviction was contrary to the weight of the evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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DELBERT LEE TIBBS, PETITIONER

v.

STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents a question concerning the effect of the Double Jeopardy Clause when a court sets aside or reverses a conviction, not because the supporting evidence is legally insufficient, but because it considers the guilty verdict to be contrary to the weight of the evidence.

The Supreme Court of Florida reversed petitioner's conviction by a jury for murder and rape and ordered a new trial under a state rule requiring ap-

pellate courts, in cases in which a sentence of death is imposed, to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not" (Fla. App. R. 6.16(b) (rev. 1962) (Pet. App. C1-C10)). As the court later explained, that decision was not based upon the legal sufficiency of the evidence (the court expressly held that the evidence was legally sufficient under Florida law) but upon the court's own "reweighing" of the evidence (*id.* at A1-A12).

In the federal system, new trials are sometimes ordered on similar grounds. Rule 33 of the Federal Rules of Criminal Procedure provides that a district court "may grant a new trial * * * if required in the interest of justice." One of the circumstances in which such relief may be granted is when the evidence is legally sufficient but the verdict is contrary to the clear weight of the evidence. See, *e.g.*, *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980); *United States* v. *Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979); *United States* v. *Fortune*, 513 F.2d 883, 890 (5th Cir.), cert. denied, 423 U.S. 1020 (1975); *United States* v. *Weinstein*, 452 F.2d 704, 716 (2d Cir. 1971); *United States* v. *Shipp*, 409 F.2d 33, 36 (4th Cir.), cert. denied, 396 U.S. 864 (1969); 8A *Moore's Federal Practice* ¶ 33.02, at 33-4 & n.3 (2d ed. 1981); 2 C. Wright, *Federal Practice and Procedure* § 553, at 486-487 (1969). Thus, resolution of the question presented by this case may affect the federal government's ability to retry defendants when a new trial is granted under Rule 33 on the basis of the weight of the evidence at trial.

STATEMENT

1. Petitioner was indicted and tried before a jury in the Circuit Court of Lee County, Florida, for first degree murder, rape, and felony murder. The evidence at trial showed the following: On February 3, 1974, Terry Milroy and Cynthia Nadeau were hitchhiking from St. Petersburg to Marathon, Florida. At Fort Meyers, they were picked up by a man in a green truck. After some time, the driver of the vehicle headed into a field, stopped and requested Milroy to get out and "give [him] a hand." Several minutes later, Nadeau also left the truck and observed the driver holding Milroy at gunpoint. The driver ordered Nadeau to undress and to perform an act of sodomy. She did so. Milroy begged for permission to leave, and the driver agreed. As Milroy walked away, the driver shot him. While Milroy lay on the ground pleading for his life, the driver asked, "Does it hurt, boy? You in pain?" He then shot Milroy in the head and killed him. The driver then raped Nadeau. Afterwards, he drove her back to the highway and ordered her to get out and walk in front of the truck. However, a car approached from the opposite direction and she was able to escape (Pet. App. C2; J.A. 62, 68).

Petitioner became a suspect because he matched a description furnished by Nadeau. Nadeau initially failed to select his picture from an array of photographs, but she later identified several individual photographs of him and selected him from a lineup. At trial, she unequivocally identified him as the man who murdered Milroy and raped her (Pet. App. C3-C4, C6; J.A. 60, 71-73).

Nadeau's testimony was corroborated by that of a man incarcerated in the same cell with petitioner before trial. According to the cellmate, a convicted

rapist, petitioner admitted committing the murder and rape and stated that he had abandoned the truck when it ran out of gas (Pet. App. C6).

The jury found petitioner guilty of first degree murder and rape, and he was sentenced to death.

2. By a vote of four to three, the Supreme Court of Florida reversed petitioner's convictions (Pet. App. C; J.A. 34-39). Under Florida law (Fla. App. R. 6.16(b) (rev. 1962)), the court was obligated in any case in which a death sentence was imposed to "review the evidence to determine if the interests of justice require a new trial." [1] The plurality opinion, endorsed by three justices, stated (Pet. App. C3): "Our review of the record * * * leaves us with considerable doubt that [petitioner] is the man who committed the crimes for which he has been convicted."

To support its decision, the plurality enumerated the following six "infirmities" (Pet. App. C3) in the prosecution's evidence. First, the plurality stated that except for Nadeau's testimony, no evidence

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[1] Fla. App. R. 6.16(b) (rev. 1962) provided (emphasis added):

> *Sufficiency of Evidence.* Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. *Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.*

The substance of this rule has been recodified as Fla. App. R. 9.140(f) (1981). The court also relied upon Fla. Stat. Ann. § 921.141(4) (West Cum. Supp. 1981), but that provision merely requires automatic appellate review in any case in which a death sentence is imposed.

placed petitioner in the Ft. Meyers area at the time of the crimes (Pet. App. C3). Second, the police never recovered the truck driven by the perpetrator even though Nadeau gave them a detailed description within an hour after the crimes occurred (*ibid.*). Third, on the three occasions when the police stopped petitioner for questioning, they did not find a gun or car keys in his possession. In addition, he was on foot, and "there was no evidence that he had either owned or operated a motor vehicle" (*id.* at C3-C4). Fourth, petitioner cooperated with the police on those occasions by providing the identification and information they requested and by permitting them to photograph him (*id.* at C4). After his arrest in Mississippi, he waived extradition (*ibid.*). Fifth, according to the plurality, "[n]o evidence was introduced which casts doubt on [petitioner's] veracity" (*ibid.*). He had no prior record of convictions or arrests, and the defense introduced favorable character evidence (*ibid.*). Finally, the plurality felt that several factors raised doubts about Nadeau's credibility (*ibid.*). She testified that the crimes were committed while there was sufficient daylight to permit clear observation of her assailant's features, but "independent evidence * * * indicate[d] that the crimes occurred after nightfall" (*ibid.*). She admitted smoking marijuana shortly before the crimes occurred, and she first identified petitioner when police officers showed her his picture alone, rather than in a photographic array (Pet. App. C3-C4; J.A. 36-39).

The plurality concluded (Pet. App. C4).

> We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legis-

> lature has directed that we review the "entire record." * * *
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for a new trial.

In a concurring opinion (Pet. App. C5; J.A. 39-41), Justice Boyd repeated many of the facts mentioned by the majority. He questioned Nadeau's credibility and noted her sexual conduct during the period before and after the crimes (Pet. App. C5). He also doubted the testimony of petitioner's cellmate and stated: "It should have been obvious that the witness was attempting by his testimony to benefit himself in connection with his own imprisonment" (*ibid.*). Justice Boyd added that while he concurred in the decision to remand for a new trial, "the weakness of the evidence presented in the trial court might well require that [petitioner] be released from incarceration without further litigation * * *" (Pet. App. C5).

Three members of the court dissented.[2]

3. On remand, the trial court granted petitioner's motion to dismiss the indictment on double jeopardy grounds. The court relied upon this Court's intervening decisions in *Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19 (1978), which held that double jeopardy principles bar retrial when a conviction is reversed on appeal for insufficient evidence (J.A. 2-10).

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[2] The dissenting opinion (Pet. App. C5-C10) discussed other questions raised on appeal but did not specifically address the weight or sufficiency of the evidence. It simply stated that "the several other points on appeal * * * [are not] meritorious so as to constitute reversible error" (*id.* at C9).

The District Court of Appeal of Florida, Second District, reversed (J.A. 51-56), stating: "The reversal of [petitioner's] conviction was not on the basis of pure insufficiency of the evidence but rather was bottomed upon the majority's view that the evidence was inherently weak and seriously contradicted, and that [petitioner] should be accorded the opportunity to be tried before another jury in the interest or ends of justice." *State* v. *Tibbs*, 370 So.2d 386, 388 (Dist. Ct. App. 1979).

4. The Supreme Court of Florida affirmed (Pet. App. A1-A2). After explaining the distinction between the "weight" and the legal "sufficiency" of evidence (*id.* at A4),[3] the court held that its earlier decision reversing petitioner's conviction was "one of those rare instances in which reversal was based on evidentiary weight" (*id.* at A7).[4] Noting that Nadeau's testimony was alone sufficient to support peti-

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[3] The court wrote (Pet. App. A4):

> Sufficiency is a test of adequacy. Sufficient evidence is "such evidence, in character weight, or amount, as will legally justify the judicial or official action demanded." Black's Law Dictionary 1285 (5th ed. 1979). In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt * * * Weight, at least in theory, is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." Black's Law Dictionary 1429 (5th ed. 1979). It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.

[4] The court also announced that "[h]enceforth, no [Florida] appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial" (Pet. App. A6).

tioner's conviction under Florida law, the court stated: "In effect, we reweighed the evidence supporting [petitioner's] conviction and remanded for a new trial" (*ibid.*). It added (*id.* at A7-A8; emphasis in original):

> Only by stretching the point * * * could we possibly use an "insufficiency" analysis to characterize our previous reversal of [petitioner's] convictions. * * * [W]e cannot fairly conclude from our original opinion that [petitioner's] convictions were reversed on the grounds of evidentiary insufficiency. If they were not, then generalized double jeopardy concepts are of no value here, for the United States Supreme Court has now made relatively clear that *only* those appellate reversals tantamount to an acquittal for insufficient evidence prohibit retrial under Burks.[5]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause does not bar reprosecution when a new trial is ordered, either at the trial level or on appeal, because of the weight, rather than the legal insufficiency, of the evidence. This Court has stated that retrial of a defendant following reversal of his conviction on appeal does not violate double jeopardy principles except in one circumstance: when the conviction is reversed for insufficient evidence.

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[5] Three members of the court dissented (Pet. App. A8-A12). Chief Justice Sundberg stated that characterizing the court's prior decision as "an erroneous reweighing of the evidence" was "improvident at best" (*id.* at A8) and that, in any event, retrial would violate double jeopardy (*id.* at A8-A9). Justice England stated merely that petitioner's indictment should be dismissed in the interest of justice (*id* at A11). Justice Boyd construed the reversal of petitioner's conviction as having been based upon the insufficiency of the evidence (*id.* at A11-A12).

In the federal courts, the test for the legal sufficiency of the evidence is narrow and clear: the evidence must be such, when viewed in the light most favorable to the government, to allow a reasonably minded juror to find the defendant's guilt proved beyond a reasonable doubt. This test also reflects the constitutional minimum that state convictions must satisfy. In judging the sufficiency of the evidence, a court may not weigh the evidence or assess the credibility of witnesses.

A sharp distinction exists between the reversal of a conviction for insufficient evidence and the granting of a new trial in "the interest of justice" because the verdict is contrary to the clear weight of the evidence. Fed. R. Crim. P. 33. In deciding whether to grant a new trial based upon the weight of the evidence, the trial judge is said to sit as the "thirteenth juror" and may assess the credibility of witnesses and weigh the evidence.

This Court's relevant double jeopardy decisions carefully distinguished between the reversal of a conviction for insufficient evidence and the granting of a new trial based upon the weight of the evidence. In addition, the logic of the decisions barring retrial in the former instance is plainly inapplicable in the latter. This Court reasoned that the reversal of a conviction for insufficient evidence means that an acquittal should have been granted at trial and that such a reversal should therefore have the same effect as an acquittal for double jeopardy purposes. By contrast, when a new trial is granted based upon the weight of the evidence, it necessarily means that the evidence would not have justified an acquittal by the court. Since affirmance of the conviction would be constitu-

tionally invalid in one instance and constitutionally permissible in the other, it is not surprising that the two types of decisions have different double jeopardy consequences.

Moreover, barring reprosecution when a new trial is granted based upon the weight of the evidence would not benefit defendants as a class. At the least, judges would probably be far more reluctant to grant such relief in light of its drastic consequences. And provisions such as Rule 33 that authorize judges to set aside guilty verdicts based upon their own evaluation of the evidence might even be abolished altogether. Furthermore, allowing judges to bar further prosecution despite the jury's verdict and the legal sufficiency of the evidence would permit usurpation of the jury's authority as the trier of fact and would infringe upon the government's rights to insist upon a jury trial.

In this case, it is clear that petitioner's convictions were not reversed for insufficient evidence. The Supreme Court of Florida so construed its own decision, and there seems to be no justifiable basis for overturning that conclusion, since the positive identification of petitioner by the surviving victim and the testimony of petitioner's cellmate clearly sufficed to satisfy the federal constitutional requirement that every conviction be supported by proof beyond a reasonable doubt. Petitioner's convictions were reversed because Florida law, like Fed. R. Crim. P. 33, affords relief not required by the Constitution. But when such relief is granted to a defendant even though the Constitution would have permitted affirmance of his conviction, there can be no federal constitutional bar to retrial.

ARGUMENT

The Double Jeopardy Clause, in our view, permits reprosecution when a new trial is ordered, either at the trial level or on appeal, on account of the weight, rather than the legal insufficiency, of the evidence. Petitioner's argument that retrial should be barred under those circumstances finds no support either in this Court's previous decisions concerning related double jeopardy questions or in the reason for permitting courts to reject jury verdicts based upon the weight of the evidence at trial.

1. It has long been established that retrial is generally allowed when a defendant's conviction is reversed on appeal. See *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *United States* v. *Ball*, 163 U.S. 662, 672 (1896). In *Burks* v. *United States*, 437 U.S. 1 (1978), however, this Court held for the first time that retrial is barred when a federal conviction is reversed for insufficient evidence. In *Greene* v. *Massey*, 437 U.S. 19 (1978), the same principle was held applicable to the states.

The reasoning in *Burks* and *Greene* was straightforward. Noting that a new trial is not permitted when the trial court recognizes that the evidence is insufficient and therefore grants an acquittal, the Court in *Burks* stated that "it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient" (437 U.S. at 11; emphasis in original). The Court elaborated (*id.* at 16; emphasis in original):

> [S]uch an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society

> has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Then, in a paragraph highly significant for present purposes, the Court explained the narrow meaning of "evidentiary insufficiency" under federal law (437 U.S. at 16-17; citations omitted):

> Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. * * * The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. * * * Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. * * * [I]t is apparent that such a decision will be confined to cases where the prosecution's failure is clear.

This narrow test for evidentiary insufficiency contrasts sharply with the latitude enjoyed by federal district courts to grant new trials under Rule 33 of the Federal Rules of Criminal Procedure on the ground that the verdict is against the clear weight of the evidence.[6] See, *e.g.*, *United States* v. *Leach*, 427

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[6] However, the remedy provided by Rule 33 should be exercised sparingly and only in exceptional cases. See, *e.g.*, *United States* v. *Lincoln*, *supra*, 630 F.2d at 1319; *United States* v. *Leach*, *supra*, 427 F.2d at 1111.

F.2d 1107 (1st Cir.), cert. denied, 400 U.S. 829 (1970). In deciding whether to grant such relief, the court may weigh the evidence and consider the credibility of witnesses. See, *e.g.*, *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980); *United States* v. *Lopez*, 576 F.2d 840, 845 (10th Cir. 1978); *United States* v. *Robinson*, 71 F.Supp. 9, 10 (D.D.C. 1947). It has been said that the court sits as a "thirteenth juror" (see *United States* v. *Lopez*, *supra*, 576 F.2d at 845; *Brodie* v. *United States*, 295 F.2d 157, 160 (D.C. Cir. 1961) (Burger, J.)), thereby implying that the court may consider any factor upon which a rational juror could properly base his or her vote.[7] By carefully pointing out in *Burks* what is meant by evidentiary insufficiency under federal law, this Court made it clear that its decision did not extend to cases in which new trials are granted under Rule 33. The same is presumably true with respect to analogous state rules.

Moreover, the reasoning in *Burks* and *Greene*—that a reversal for insufficient evidence means that an acquittal should have been granted and that such a reversal should therefore have the same effect as a verdict of not guilty at trial for double jeopardy purposes—is clearly inapplicable when a new trial is ordered based upon the weight of the evidence. Indeed, when a new trial is granted on that ground, it necessarily means that the evidence did not justify the entry of an acquittal.

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[7] It has also been stated in dictum that if a trial court abuses its discretion in denying such relief, its decision may be reversed on appeal. See, *e.g.*, *United States* v. *Indelicato*, *supra*, 611 F.2d at 387.

That reprosecution is permitted when a new trial is ordered based upon the weight of the evidence was made even clearer last term in *Hudson* v. *Louisiana*, 450 U.S. 40 (1981). There, retrial was barred because the trial court rejected the jury's guilty verdict and granted a new trial on the ground that the evidence was insufficient. Under an unusual provision of Louisiana law, the trial court lacked the authority to enter a judgment of acquittal in a case tried to a jury. This Court therefore viewed the trial court's decision as tantamount to an acquittal. However, the Court carefully distinguished the situation in that case from one in which a trial judge grants a new trial "because he, as a '13th juror,' would have decided it differently from the other 12 jurors" (*id.* at 44). The Court added (*id.* at 44-45 n.5):

> *Burks* precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so * * * By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

2. Petitioner, relying upon Chief Justice Sunberg's dissenting opinion in the court below, contends nevertheless (Br. 14) that the logic of *Burks* applies whether a reversal is based upon the weight or the sufficiency of the evidence. As Chief Justice Sundberg put it (Pet. App. A9), the prosecution should not be "allowed a 'second crack' at convicting a defendant when its first effort fell short of the mark because it somehow failed to present the proper evidence."

In our view, that reasoning is misguided. When a conviction is reversed, not because the evidence was

legally insufficient, but because of a court's evaluation of the weight of the evidence, the prosecution is not given a "second crack" at obtaining a conviction. No "second crack" is needed, since the prosecution secured a constitutionally valid conviction on its first try. Not only did it meet the threshold obligation of presenting evidence legally sufficient to sustain the conviction, but it fulfilled its ultimate factual burden of convincing a jury of the defendant's guilt. If the conviction has been affirmed, such a judgment would not have been subject to federal constitutional attack. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979). Thus, it is the *defendant* who is given a second chance—a chance to present new or different evidence, a chance that the second jury will take a more favorable view of the evidence than the first, and a chance to benefit if the prosecution errs or if some of its proof becomes unavailable.[8]

The provision of Fed. R. Crim. P. 33 permitting a trial judge to grant a new trial "if required in the interest of justice" is a final safeguard for the defendant who has been lawfully convicted. Even though the prosecution has presented legally sufficient evidence and even though it has convinced all 12 jurors of the defendant's guilt, the trial judge, sitting as the "thirteenth juror," is empowered to reject the jury's verdict and give the defendant a second chance if his sense of "justice" requires. Broad latitude is afforded

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[8] Of course, a defendant who preferred the alternative of leaving the original conviction standing to that of undergoing a retrial would have a strong argument that double jeopardy principles afford him the right to reject a retrial and elect to leave the conviction standing. See *United States* v. *Smith*, 331 U.S. 469 (1947).

judges under Rule 33 precisely because the relief authorized—a new trial—is not final in nature:

> In directing a judgment of acquittal, the Court makes a final disposition of the case. On the other hand, in setting the verdict aside the Court merely grants a new trial and submits the issues for determination by another jury. It is appropriate that in the latter instance, the Court should have wide discretion in the interest of justice.

United States v. *Robinson*, 71 F.Supp. 9, 11 (D.D.C. 1947).

If, however, reprosecution were barred whenever a new trial is granted based upon the weight of the evidence, trial judges might not possess the same latitude that they now enjoy. For one thing, a trial judge troubled by the prosecution's proof and personally uncertain about the defendant's guilt might be willing to require reevaluation of the evidence by a second jury but unwilling to take sole responsibility for setting free a possibly guilty and dangerous man. Thus, if the argument advanced by petitioner were accepted, the value of Rule 33 to defendants as a class might be lessened appreciably. Moreover, there is nothing to suggest that provisions allowing trial judges to set aside guilty verdicts despite the legal sufficiency of the evidence are constitutionally required. Consequently, if they became vehicles for usurping the jury's authority as the trier of fact, they might be abolished altogether. It is perhaps instructive that the Supreme Court of Florida took the occasion of petitioner's second appeal to abrogate the prior state practice permitting appellate review of the weight of the evidence supporting a conviction.

Finally, the government's right to insist upon a jury trial (Fed. R. Crim. P. 23(a); *Singer* v. *United*

States, 380 U.S. 24 (1965)), would be an empty one if a "not guilty" vote by the "thirteenth" juror—the trial judge—were sufficient to acquit. It is one thing for the trial judge to require that a second jury reconsider the evidence, despite its legal sufficiency, and quite another for him to place a defendant beyond the reach of the law based upon his personal evaluation of the weight of the evidence or his personal opinion concerning the credibility of witnesses.

3. Petitioner maintains (Br. 6, 12, 17, 19) that his conviction was actually reversed for insufficient evidence, but his contention is clearly incorrect. First, the Supreme Court of Florida has decided that the evidence was sufficient as a matter of state law. Whether that court correctly interpreted and applied state law is clearly not a question subject to review by this Court. See, *e.g.*, *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134, 135 (1962). Second, it is apparent that the proof at petitioner's trial was sufficient for federal constitutional purposes, *i.e.*, the prosecution fulfilled its obligation under the Due Process Clause of the Fourteenth Amendment to prove every element of the offense charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). In *Jackson* v. *Virginia*, *supra*, this Court described the test for determining whether a state has met that burden (443 U.S. at 318-319; citations omitted; emphasis in original):

> [T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." * * * Instead, the relevant question is whether,

> after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In the present case, the proof was certainly sufficient to meet these requirements. "[V]iewing the evidence in the light most favorable to the prosecution" (*Jackson* v. *Virginia*, *supra*, 443 U.S. at 319) means, among other things, that a reviewing court is not to assess the credibility of witnesses. See *Burks* v. *United States*, *supra*, 437 U.S. at 16. Thus, the testimony of Nadeau and petitioner's cellmate were ample to satisfy the obligation imposed upon the State by the federal Constitution.

The reversal of petitioner's conviction, however, was based heavily upon an evaluation by appellate judges of the credibiilty of key witnesses whose testimony they did not hear or see. The plurality opinion expressed doubts about Nadeau's credibility, while observing—inaccurately—that "[n]o evidence was introduced which casts doubt on [petitioner's] veracity" (Pet. App. C4).[9] Justice Boyd's concurring opinion also expressed doubts about Nadeau's credibility and stated that the cellmate who testified concerning petitioner's confession was obviously "attempting by his testimony to benefit himself in connection with his own imprisonment" and was thus unworthy of belief (Pet. App. C5). As for petitioner, Justice Boyd stated that Nadeau's portrayal of the "ruffian" who murdered her companion and raped her "con-

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[9] Presumably Nadeau's testimony that petitioner committed a brutal murder and rape and the testimony of petitioner's cellmate that he confessed to those crimes "cast doubt" upon the veracity of petitioner's denials.

flicted substantially" with the portrait painted by defense character witnesses (*ibid.*).[10]

Such judgments concerning the credibility of witnesses have no bearing upon the sufficiency of the evidence under the Due Process Clause. Thus, for purposes of the federal Constitution, the evidence at petitioner's trial was sufficient, and his conviction could permissibly have been affirmed. However, Florida law, like Fed. R. Crim. P. 33, goes beyond what the Constitution requires by providing a vehicle for setting aside convictions, at the request of the defense, based upon the weight of the evidence, even though the evidence is constitutionally sufficient.[11]

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[10] The central role played by credibility determinations in the reversal of petitioners' convictions is highlighted by the nature of the other "infirmities" in the evidence cited by the plurality. If petitioner was indeed the perpetrator of the crimes described by Nadeau, it was almost to be expected that he would abandon the truck, discard incriminating evidence, and feign cooperation after he fell under suspicion. Nor is it particularly surprising that the truck, which may have been abandoned in a remote area far from the crime scene, was never recovered.

[11] As explained by the Supreme Court of Florida in the opinion below, the power of a Florida judge to grant a new trial based upon the weight of the evidence is similar to that of a federal district court judge. In deciding whether to grant such relief, the opinion observed, a Florida trial judge may "weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror" (Pet. App. A4 n.9). In like manner, the test for the sufficiency of the evidence under Florida law does not differ from the federal test. The evidence is sufficient under Florida law, the court stated, if "after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict * * *, there is substantial competent evidence to support the verdict and judgment" (Pet. App. A4). Since federal law and Florida law are similar in these respects, a decision barring reprose-

Florida law, like Fed. R. Crim. P. 33, conditions that relief by permitting reprosecution. In effect, then, the Florida scheme is as follows: If the prosecution fails to adduce the minimum quantum of evidence required by due process to sustain a conviction, the defendant is entitled to an acquittal, and retrial is barred. If the prosecution satisfies that burden, but the quantity and character of the evidence at trial falls short of a higher standard, the defendant is accorded the right to have his guilt or innocence redetermined by a second jury if he wishes. Finally, if the evidence exceeds this second level, the conviction is affirmed.

Since Florida would be perfectly free to establish a scheme in which the defendant's conviction is affirmed in all but the first of these situations, we cannot imagine how the Double Jeopardy Clause could bar it from affording the defendant, as a matter of grace, the opportunity to be acquitted by a second jury.[12]

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cution of petitioner would have serious implications for the administration of criminal justice both at the federal and state levels.

[12] The situation here is entirely different from that in cases like *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), where, although the State may be free to define the elements of a criminal offense, it is not free, once having defined them, to permit their proof by evidence falling short of the constitutionally required reasonable doubt standard. Those cases are explained by the combined effect of the due process requirement that the legislature clearly define the elements of a criminal offense and that conviction for such an offense not be based on evidence falling short of establishing the defendant's commission of the offense beyond a reasonable doubt. In cases such as this one, however, the prosecution has satisfied that constitutional standard.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted.

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